

# **MANDATORY MEDIATION AS A DISPUTE RESOLUTION MECHANISM IN THE CIVIL JUSTICE SYSTEM**

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specialising in Public Law**

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in the Faculty of Law  
at the University of the Free State

Prepared under the supervision of Mr EC Muller

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## DECLARATION

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I, **Samantha Britz**, declare that the master's degree by coursework and mini-dissertation that I herewith submit for the master's degree qualification *Master of Laws specialising in Public Law* at the University of the Free State is my independent work, and that I have not previously submitted it for a qualification at another institution of higher education.

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# TABLE OF CONTENTS

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**DECLARATION ..... ii**

**ACKNOWLEDGEMENTS ..... iii**

**TABLE OF CONTENTS ..... iv**

**LIST OF TABLES ..... vi**

**LIST OF ABBREVIATIONS AND ACRONYMS ..... vii**

**ABSTRACT..... viii**

***Chapter 1***

**BACKGROUND TO THE STUDY ..... 1**

---

1.1 Introduction ..... 1

1.2 Research questions, objectives and methodology ..... 2

    1.2.1 Research questions ..... 3

    1.2.2 Objectives ..... 3

    1.2.3 Scope of the research ..... 3

1.3 Terminology and definitions ..... 4

1.4 Chapter overview ..... 8

***Chapter 2***

**HISTORICAL OVERVIEW..... 9**

---

2.1 Introduction ..... 9

2.2 Review of the civil justice system in South Africa ..... 9

2.3 Access to justice ..... 12

2.4 Civil litigation procedures in South Africa ..... 14

    2.4.1 Litigation in terms of the action procedure ..... 16

    2.4.2 Proceeding to trial ..... 20

    2.4.3 Litigation in terms of the application proceedings ..... 21

2.5 Mediation versus litigation ..... 21

    2.5.1 How is the mediation process different to the litigation process? ..... 22

    2.5.2 Advantages of the mediation process ..... 23

    2.5.3 Disadvantages of mediation ..... 24

2.6 Status of mediatory provisions in South Africa ..... 26

    2.6.1 Mediation in the employment sector ..... 27

    2.6.2 The functions of the Commission for Conciliation, Mediation  
        and Arbitration ..... 28

2.6.3	Appointment of commissioners at the Commission for Conciliation, Mediation and Arbitration .....	28
2.6.4	Commercial dispute resolution .....	29
2.6.5	Administration of black affairs prior to 1994.....	29
2.6.6	Unlawful occupation of land .....	30
2.6.7	Family matters.....	30
2.7	The purpose of mediation in the justice system .....	33
2.8	Conclusion.....	34
<b>Chapter 3</b>		
<b>COMPARISON OF COURT-ANNEXED MEDIATION IN DIFFERENT JURISDICTIONS .....</b>		<b>35</b>
3.1	Introduction .....	35
3.2	Jurisdictions of Canada and Indonesia .....	35
3.2.1	Canada.....	35
3.2.2	Indonesia.....	40
3.2.3	Lessons for South Africa.....	43
3.3	South Africa .....	45
3.3.1	Court-annexed mediation .....	48
3.3.2	Referring disputes for mediation prior to commencement of the litigation process.....	50
3.3.3	Referral of a dispute to mediation once litigation has commenced .....	50
3.3.4	Data of cases for the period 2014–2017 .....	54
3.4	Conclusion.....	56
<b>Chapter 4</b>		
<b>ADVANTAGES OF MEDIATION .....</b>		<b>57</b>
4.1	Introduction .....	57
4.2	Case study of the mediation process .....	57
4.3	The feasibility of mandatory mediation.....	60
4.4	Constitutional position .....	61
4.5	First rules versus current rules .....	64
4.6	Conclusion.....	65
<b>Chapter 5</b>		
<b>CONCLUSION AND RECOMMENDATIONS .....</b>		<b>67</b>
<b>LIST OF REFERENCES.....</b>		<b>71</b>

**LIST OF TABLES**

---

Table 3.1: Mediation success in 2013.....43

Table 3.2: Number of cases captured at pilot sites .....55

Table 3.3: Status of cases .....55

# LIST OF ABBREVIATIONS AND ACRONYMS

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ADR	Alternative Dispute Resolution
CCMA	Commission for Conciliation, Mediation and Arbitration
CJRP	Civil Justice Reform Project
DiSAC	Dispute Settlement Accreditation Council
DoJ&CD	Department of Justice & Constitutional Development
LASA	Legal Aid South Africa
LRA	Labour Relations Act
RSA	Republic of South Africa
SALC	South African Law Commission
SAQA	South African Qualifications Authority
SASPS	South African School of Paralegal Studies
SETA	Skills Education Training Authorities

## ABSTRACT

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Mediation as a dispute resolution mechanism is not an unfamiliar concept in the South African civil justice jurisprudence. Approximately 50 statutes contain provisions referring to mediation. Apart from provisions in the Labour Relations Act that provide for mandatory conciliation in certain instances, mediation is otherwise not compulsory. The adversarial nature of the civil justice system in South Africa and the overburdened courts inevitably lead to protracted and expensive battles in court. This research investigated the need for mandatory mediation as a necessary procedural step in the civil dispute resolution process, considering the newly promulgated court-annexed mediation. The process of mediation allows parties to come up with a solution that is suitable to both, as amicably as possible and without influence from their legal representatives. When there is a dispute between parties, an appointed mediator will facilitate discussions between the parties to assist in identifying issues and explore possible concessions or solutions.

The practical and academic reasons for the research was to indicate how mediation can ameliorate the negative effects of the adversarial system on litigants and courts and contribute to the constitutional mandate of access to justice through speedy and cost-effective dispute resolution mechanisms.

The study focused on the historical development of mediation in the South African context and investigated the mediation process as well as the relevant terminology. The research furthered consider the current legal status of mediatory provisions contained in statutes with specific reference to the newly promulgated court-annexed mediation rules that provide for voluntary submission to mediation. A critical discussion of the advantages and disadvantages of mediation was undertaken, as well as the constitutionality of mandatory mediation in relation to the constitutional right of access to courts. The effectiveness of the pilot court-annexed mediation project in certain magisterial districts in the Gauteng and North West Provinces was explored with the view to indicate if the project is successful and what impact it has on the justice system. The dissertation further indicated that mediation increases access to justice, decongests court roles and is cost-effective for both litigants and government.

Comparative law and experience, particularly that of Indonesia and Canada, where mandatory mediation has been implemented in order to gain insight in the success and failures in those jurisdictions were explored to assist in establishing the applicability in the South African context.

For contextual information, the South African Law Commission's report on *Alternative Dispute Resolution* and subsequent policy decisions by government leading to the promulgation of the court-annexed mediation rules were used. Empirical data from the Department of Justice was used to determine the efficacy of the pilot court-annexed mediation project. Three court cases were briefly discussed to indicate the judicial approval of mediation, as well as the legislation providing for mediation.

Keywords: mediation, court-annexed mediation, alternative dispute resolution, civil justice

## **1.1 Introduction**

The litigious nature of modern society always allows for some sort of dispute or disagreement between people in the different spheres of life. The process followed to resolve these disputes should be approached with caution, especially where there is an existing relationship between the parties. In South Africa, the litigation process is the most common method used in resolving civil disputes. This process, unfortunately, has numerous shortcomings which include the adversarial nature of the process that can sometimes damage the relationship between the parties. Another flaw in this process is the very complex, expensive and time-consuming nature of civil litigation. These deficiencies place a burden on access to justice for South Africans, particularly on the indigent part of society that needs it the most.<sup>1</sup>

Mediation as a dispute resolution mechanism is not an unfamiliar concept in the South African civil justice jurisprudence. Approximately 49 statutes contain provisions referring to mediation.<sup>2</sup> Apart from provisions in the Labour Relations Act (LRA)<sup>3</sup> that provide for mandatory conciliation in certain instances, mediation is otherwise not compulsory in South Africa.

The Constitution<sup>4</sup> of the Republic of South Africa is one of the most significant changes in the transition process to become a democratic country with a clear right to access to justice. Section 34 of the Constitution provides that “[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum”.

The effect of this right was analysed at the Access to Justice Conference held in July 2011, where the chief justice stated:

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<sup>1</sup> Maclons 2014:v.

<sup>2</sup> Brand *et al* 2012:92-98.

<sup>3</sup> Act 66 of 1995.

<sup>4</sup> Constitution of the Republic of South Africa 1996.

The key problems affecting our justice system include delays in the system, its accessibility, inadequate court facilities, including courtrooms and library facilities. In addition, our justice system has not taken full advantage of the developments in information technology in order to improve the efficiency of our courts. In many ways our courts are not functioning as efficiently and effectively as we would wish, and this has an adverse impact on the delivery of justice, particularly in respect of the poor and vulnerable in our society. Unless urgent attention is given to these issues, the confidence in the justice system may very well be undermined. The primary challenge facing the judiciary is to re-examine the fundamentals of the justice system.<sup>5</sup>

This study was based on the premise that the use of mediation as a mandatory process can significantly contribute to achieving the constitutional imperative of quality access to justice for all citizens.

## **1.2 Research questions, objectives and methodology**

The adversarial nature of the civil justice system and the overburdened courts inevitably leads to protracted and expensive battles in court. Apart from the legal cost incurred by the parties to the dispute, the focus should be broadened to put the entire system relating to cost into perspective. It also includes, in a broader sense, not only the legal fees incurred by the government, but also the cost of the administration of the civil justice system which is ultimately paid for by the taxpayer. This statement can be supported by the response by Prof Erasmus with regard to his mandate to review the civil justice system and “to draft a set of new rules that would bring about the harmonization of the rules with the Constitution”,<sup>6</sup> which will be discussed in Chapter 2. In summary, Prof Erasmus indicated that the court system is influenced by more than just overburdened court roles, considering the fact that there are cost implications in terms of the human resources, for example judicial officers who must be available for each case, and sometimes the same case that was not finalised the first time.

The aim of the study was therefore to do a critical evaluation of the advantages and the disadvantages of mediation to determine if it will have any effect on the constitutional right of the public in terms of access to courts.

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<sup>5</sup> Radebe “Address delivered at the *Access to Justice Conference*” [http://www.justice.gov.za/m\\_speeches/2011/20110708\\_min\\_ajc.html](http://www.justice.gov.za/m_speeches/2011/20110708_min_ajc.html) (accessed on 19 October 2017).

<sup>6</sup> Vahed R 2011. *Access to Justice Advocate* 24(2):2-4.

### **1.2.1 Research questions**

Considering the fact that mediation is currently a voluntary process, the following research questions were posed:

1. Will this process, if successfully implemented, remain voluntary in nature or should it become a mandatory process equally applied in every civil dispute?
2. Will the process of mediation ultimately address the challenges identified in the civil justice system?

### **1.2.2 Objectives**

To answer these questions, the following objectives were set:

1. To gain insight and to find plausible solutions by investigating the procedural aspects of the litigation process of South Africa.
2. In addition to the current status of mediation in South Africa, to investigate the comparative law and experience, particularly that of Canada and Indonesia, where mandatory mediation has been implemented in order to gain insight in the successes and failures in those jurisdictions and to assist in establishing the applicability in the South African context.
3. To understand the mediation process and how it can assist to resolve disputes.
4. To understand the definition of the various forms of mediation and how they work.

### **1.2.3 Scope of the research**

The effectiveness of the pilot court-annexed mediation process? in certain magisterial districts in the Gauteng and North West Provinces were investigated. This information is important to indicate if the process was successful and what impact it had on the justice system.

The study further attempted to indicate that mediation increases access to justice, decongests court roles and provides a more cost-effective dispute resolution mechanism for both litigants, the government and by implication the taxpayer.

### 1.3 Terminology and definitions

One of the aims of this study was to write the content in such a way that a lay person would be able to understand the content as contained herein. For the sake of completeness, certain words and terms were repeated throughout the study and will be explained and/or defined as set out below:

First, it is important to understand the term **dispute** which is referred to throughout the study. The West's Encyclopedia of American Law defines 'dispute' as follows:

A conflict or controversy; a conflict of claims or rights; an assertion of a right, claim, or demand on one side, met by contrary claims or allegations on the other. The subject of litigation; the matter for which a suit is brought and upon which issue is joined, and in relation to which jurors are called and witnesses examined. A labor dispute is any disagreement between an employer and his or her employees concerning anything job-related, such as tenure, hours, wages, fringe benefits, and employment conditions.<sup>7</sup>

Considering the above definition, it is clear that a method should be put in place to resolve the dispute and at the same time restore the balance of the relationships between the parties. Mediation is thus just one of the methods among numerous others used to resolve disputes.<sup>8</sup>

**Alternative Dispute Resolution**, also known as **ADR**, refers to any procedure for resolving disputes by means other than litigation. Mediation is a form of ADR.<sup>9</sup> ADR consists of various mechanisms and processes which are designed to assist parties to effectively resolve their disputes.<sup>10</sup> These processes can be seen as supplementary to the formal litigation processes with the following objectives in mind:

- Relieve court congestion, as well as prevent undue cost and delay.
- Enhance community involvement in the dispute resolution process.
- Facilitate access to justice.
- Provide a more effective dispute resolution.<sup>11</sup>

Initially ADR concentrated on arbitration as an alternative process to the normal court proceedings. This was the stance of the early sixteenth century, as supported by the literatures of the famous Roman-Dutch legal academic, Johannes Voet, who

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<sup>7</sup> Quoted in the Free Dictionary. <http://legal-dictionary.thefreedictionary.com/dispute> (accessed on 11 September 2017).

<sup>8</sup> Marnewick 2015:11.

<sup>9</sup> Boule 2012:12.

<sup>10</sup> SALC (SALC). Alternative dispute resolution 1997:13-14.

<sup>11</sup> SALC 1997:17.

wrote that people were turning to arbitration to avoid the 'din and strife of the courts'. Since the early days it was recognised that parties could, instead of going to court, appoint a person of their choice to decide on their dispute.<sup>12</sup>

The most common types of ADR include arbitration, conciliation, mediation and negotiation.<sup>13</sup>

The **arbitration** process commences when the conciliation process has failed, in that a settlement could not be reached by the parties. One of the parties may then request that the dispute be resolved by way of arbitration. At an arbitration hearing, both parties will be given an opportunity to present their case. The commissioner will then make a ruling on the issue in dispute. The order is called an arbitration award and is legally binding on both parties. Efforts should largely be made to resolve the dispute through the conciliation process; however, if it cannot be resolved by conciliation, the parties can go to arbitration or the Labour Court.<sup>14</sup> Arbitrations in this sense is applicable to the Commission for Conciliation, Mediation and Arbitration (CCMA) which is a dispute resolution body established in terms of the LRA, 66 of 1995. This paragraph is therefore merely for contextual purposes.

**Conciliation**, most commonly used in labour related disputes, can be explained as the process where a commissioner will meet with the parties in the dispute, and attempt to settle the dispute by way of an agreement. During this process a party may appear in person, be represented by a co-employee, a union representative or office bearer of the said union or registered employers' organisation. The meeting is conducted in an informal manner.<sup>15</sup>

The term **mediation** can be defined as the process during which a mediator assists the parties to a dispute to resolve the challenges or issues by facilitating discussions between the parties. The mediator assists the parties to identify issues, set priorities, identify areas of compromise and create possibilities in an attempt to solve the dispute.<sup>16</sup> More formally, one can refer to the definition as contained in Rule 73 of the Magistrates' Court Rules. It is further stressed in Rule 72 of the Magistrates' Court

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<sup>12</sup> Information received from the DoJ&CD, "Training Manual on Mediation".

<sup>13</sup> SALC1997:13.

<sup>14</sup> CCMA "Arbitration" <http://www.ccma.org.za/Advice/CCMA-Processes/Arbitration> (accessed on 19 August 2017).

<sup>15</sup> CCMA "Conciliation" <http://www.ccma.org.za/Advice/CCMA-Processes/Conciliation> (accessed on 19 August 2017).

<sup>16</sup> De Rebus "Draft mediation rules" <http://www.derebus.org.za/draft-mediation-rules/> (accessed on 19 August 2017).

Rules that mediation is a voluntary process. The key principles of mediation are that it is a voluntary, flexible and confidential process conducted without prejudice by an impartial, neutral and independent mediator.<sup>17</sup>

There are different models of mediation which are explained by Boule (1998)<sup>18</sup>. He distinguishes between four models of mediation, namely:

□ **Settlement**

Encourage negotiations between parties towards a common outcome. The mediator therefore aims to move the parties from their individual positions to reach a compromise which will suit both parties. Positional negotiations are a good example of this model as the parties to the matter negotiate towards an already formally set position. The process then attempts to justify these positions.<sup>19</sup> The mediator will merely determine what the main focus of each party is and by means of convincing techniques, move the parties from their specific positions towards a more compromising position.<sup>20</sup>

□ **Facilitative**

In this model the primary focus is to help the parties find and express their interests as well as their needs. The reasoning behind the use of this model or method is the presumption that this will result in common ground being brought to the fore and highlight areas where parties will be willing to compromise. During a facilitative mediation, the mediator is therefore trying to re-open communication between the parties and explore the options for settlement.<sup>21</sup> In this instance the mediator does not necessarily have to be an expert on the subject or topic of the dispute. The main purpose of the mediator is only to ensure constructive discussions between parties in order to improve the negotiation process.<sup>22</sup>

□ **Therapeutic**

The objective of this model is to deal with the underlying causes of the dispute with a view to improve future relationships between the parties. The type of mediator that will assist in this process is a person with a counselling or social

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<sup>17</sup> Brand *et al* 2012:15.

<sup>18</sup> Boule 1998:43-47.

<sup>19</sup> Brand Steadman & Todd 2012:15.

<sup>20</sup> Boule 1998:28.

<sup>21</sup> Brand *et al* 2012:15.

<sup>22</sup> Boule 1998:28.

work background who will understand the psychological causes of the conflict.<sup>23</sup> In this instance, the mediator will use professional therapeutic techniques throughout the process in order to heal any challenges identified in the relationship.<sup>24</sup>

#### □ **Evaluative mediation**

During this process, mediators attempt to provide parties with a realistic assessment of their negotiating positions according to the legal rights and entitlements, with the consideration of possible outcomes should the matter be adjudicated by the court. The mediator does not openly express his or her opinions on the issues. If, on the other hand, the mediator is called upon to state his opinion on any particular issue then he or she is clearly making an evaluation of that issue.<sup>25</sup>

Should mediation indeed become a compulsory process, the researcher is of opinion that the therapeutic model and settlement model will work best in South Africa. In both these models the aim is to compromise and settle, but also to maintain and restore relationships. These two models enhance the ultimate goal of mediation which is to resolve a dispute speedily and will also provide an outcome which will not destroy the relationship between disputants but rather maintain them.

The term **mediator** can be defined as a person who is selected by the parties to a dispute, for example the clerk or registrar of the court. The selection is done from the list as provided in Rule 86(2) of the Magistrates' Court Rules. The appointed mediator will then assist the parties to mediate and resolve their dispute if possible.<sup>26</sup>

In terms of Rule 80 (1)(b)<sup>27</sup> the function of the mediator is aimed at facilitating a settlement between the two parties in a dispute.<sup>28</sup> The mediator will then assist the parties to identify and understand the actual issues in the dispute and to ultimately reach a settlement agreement accepted by the both parties.<sup>29</sup> The mediator is

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<sup>23</sup> Boule 1998:28.

<sup>24</sup> Boule 1998:28.

<sup>25</sup> Gould & Elliot "Mediation guide – the basics" <https://www.fenwickelliott.com/file/1754/download?token=1A6PXAe> (accessed on 31 July 2017).

<sup>26</sup> Magistrates' Court Rules 2010.

<sup>27</sup> Magistrates' Court Rules 2010.

<sup>28</sup> Rules Board for Courts of Law Act 107 of 1985 [http://www.justice.gov.za/legislation/notices/2017/20170929-gg41142\\_rg10763\\_gon1055\\_Rules.pdf](http://www.justice.gov.za/legislation/notices/2017/20170929-gg41142_rg10763_gon1055_Rules.pdf) (accessed on 31 July 2017).

<sup>29</sup> Vettori 2015:357.

therefore not in the position to make any final decision or determine the credibility of any party to the process.

## **1.4 Chapter overview**

Chapter 1 provided a brief overview and context of the study, as well as the aim, research questions and methodology. For contextual purposes certain key terms and definitions received attention.

Chapter 2 of the study focussed on the historical development of mediation in the South African context and investigated the mediation process, as well as the relevant terminology. The current legal status of mediatory provisions contained in statutes was considered, with specific reference to the newly promulgated court-annexed mediation rules that provide for voluntary submission to mediation.

Chapter 3 comprised a comparative study of the mediatory jurisprudence in the jurisdictions of certain Canadian provinces and that of Indonesia. These jurisdictions were chosen because the same challenges with respect to the civil justice system were identified, and as a result, mandatory mediation was introduced by way of legislation. The information gathered from these jurisdictions can be used in South Africa as guidelines and lessons to be learned in order to improve the process and address possible challenges.

In conclusion, Chapter 4 highlighted the feasibility of following a mandatory approach for court-annexed mediation. The aspect of access to justice was discussed, as well as the impact compulsory mediation may have in this regard.

## **2.1 Introduction**

This chapter firstly provides an overview of the investigations of the Civil Justice System by various stakeholders. The findings of these enquiries receive specific attention to provide context for the discussion of the civil litigation procedures that follow later in the chapter. Reference is also made to the constitutional imperative of access to justice, and the possible impact that the alternative dispute resolution mechanism may have on achieving this goal is investigated. The differences between the litigation and mediation processes are highlighted. The advantages and disadvantages of mediation are also identified. Lastly, the current status of mediatory provisions provided for in legislation and decided court cases receive attention and the broader purpose and uses of mediation in the civil justice system are indicated.

## **2.2 Review of the civil justice system in South Africa**

Both the High Court Rules and Magistrates' Court Rules, in all the divisions in the country, are backed up with matters such as divorce cases which are often settled on the steps of the court rooms. As a result, various other matters which actually deserve to be on the court role, are being delayed.<sup>30</sup>

Several investigations and commissions of inquiry have been conducted in South Africa in respect of the different contemporaneous aspects of the court system. In 1983 the so-called 'first' Hoexter Commission of Inquiry related to the structure and operations of the courts to ultimately identify the causes for delay and inadequacies of the litigation system.<sup>31</sup>

One of the primary findings was an overall frustration with the way divorce actions were dispatched in the Supreme Court, and predominantly the fact that the conditions and interests of minor children were not appropriately considered.<sup>32</sup>

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<sup>30</sup> Marnewick 2015:14.

<sup>31</sup> Consultus Editorial "Access to justice: Legal aid and civil litigation" <http://www.sabar.co.za/law-journals/1996/november/1996-november-vol009-no2-pp82-84.pdf> 9 (accessed on 31 August 2017).

<sup>32</sup> SALC Family dispute resolution 2015:16.

The report from the Hoexter Commission of Inquiry subsequently raised concerns about the South African Civil Justice System:

Civil litigation in provincial and local divisions of the Supreme Court [now High Court] is characterised by cumbersome, complex and time-consuming pre-trial procedures; overloaded case rolls which necessitate postponements.<sup>33</sup>

Although the 1983 Hoexter Report was not completely applied, it resulted in the Mediation in Certain Divorce Matters Act, 1987 coming into effect. One of the provisions of this Act was the appointment of family counsellors to assist family advocates.<sup>34</sup> The function of the family counsellor would therefore be to assist the family advocate with the enquiries after a divorce was instituted, or in the instance where there is an application to vary an order which relates to the guardianship of minor children.<sup>35</sup>

In 1996, the South African Law Commission (SALC) was requested to extend its scope of investigations to include matters relating to ADR.<sup>36</sup> A report was compiled to elicit inputs from other stakeholders. The general outcome was that ADR should be introduced to the legal system of South Africa.

The common denominators in complaints against the current justice system of South Africa are delays and the excessive cost of litigation. The impact on society is that access to justice is beyond the reach of an ordinary person.<sup>37</sup> Institutions such as Legal Aid South Africa (hereafter referred to as LASA) were established to assist indigent persons by providing legal aid or to make legal aid available within their financial means. LASA specifically has cooperation agreements with various universities that have law clinics which render legal services to their communities. The main objective of LASA is to assist the people in the community who really needs it the most. Potential clients will have to complete a means test for LASA to establish the client's monthly income.<sup>38</sup> Unfortunately, this means that these institutions are limited to only a specific pool of clients as they cannot assist everyone who requires assistance. As a result, there are still large portions of the

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<sup>33</sup> De Vos W le R 1993. Alternative dispute resolution from an access-to-justice perspective, *Journal of South African Law*, 155. <http://heinonline.org> (accessed on 25 August 2016).

<sup>34</sup> SALC 2015:17.

<sup>35</sup> Mediation in Certain Divorce Matters Act 24 of 1987 Secs 3-4(1).

<sup>36</sup> SALC 1997:11.

<sup>37</sup> SALC 1997:15.

<sup>38</sup> LASA "Who qualifies for legal aid" <http://www.legal-aid.co.za/?p=956-> (accessed on 20 August 2017).

community who do not qualify for legal aid in terms of the means test but who are still unable to afford to go through a full-fledged litigation process.

The mediation process will therefore assist those people who do not qualify in terms of the LASA means test to be assisted, but still do not necessarily have the funds to appoint an attorney to represent them. Mediation will also ensure that the parties negotiate on an equal footing as neither of them will then be represented by an attorney who will tip the scale to one side. Although legal representation is allowed during the process, the process is regulated by the mediator and in the presence of lawyers, therefore not as intimidating to the parties as it would have been in normal circumstances.

In July 2011, the Chief Justice hosted the Access to Justice Conference where the heads of the three branches of government, namely the Executive, Legislature and the Judiciary, were brought together to jointly reflect on the current justice system. The responsibility of the arms of state to uphold and protect the Constitution<sup>39</sup> includes giving effect to the right of Access to Justice. Prof HJ Erasmus was appointed by the Rules Board to review the civil justice system and thereafter draft new rules to align with the Constitution. Prof Erasmus responded to this mandate as follows:

My efforts to prepare a preliminary draft have led me to a conclusion that the development of a set of rules within the parameters of existing legislation and rules (i.e. the existing 'infrastructure') is an impossible task. What is required is a comprehensive and wholesale review of the system in all its underlying elements. In evaluating the civil justice system and in recommending change, it would be important to bear in mind that it is part of a larger system. Thus, for example, the total cost of litigation embraces more than the cost to the parties. They are also the infrastructural costs provided by the state in the form of the provision of a courtroom, officials and a judge. The wasteful use of time of the court and judges is an abuse of an expensive resource which has an adverse effect on the allocation of judicial resources. An inefficient civil justice system may, for example, adversely affect the allocation of resources in criminal cases. The economics of civil justice, a largely neglected topic in South Africa, should receive attention if an overview of the system is undertaken.<sup>40</sup>

A joint venture, named the Civil Justice Reform Project, by the Department of Justice and Constitutional Development (DoJ&CD, now known as the Department of Justice and Correctional Services)<sup>41</sup>, the Rules Board and the SALC was approved by

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<sup>39</sup> Constitution 1996.

<sup>40</sup> Vahed "Access to Justice" *Advocate* 24(2):2-4.

<sup>41</sup> Now known as the Department of Justice and Correctional Services.

Cabinet in 2010. This project consisted of three phases as discussed below, which commenced in April 2011 and final evaluation was set to be in September 2013.<sup>42</sup>

□ **Phase 1: The audit and immediate intervention phase**

This phase commenced during April 2011 and the set completion date was during March 2012. During this phase, the compatibility of the pre-constitution legislation and rules, case management in the courts, the office and powers of the registrars and clerks of court, and the cost of litigation to people, including sheriff fees, court fees, witness fees and travelling costs, were analysed.

□ **Phase 2: Programme of action for the work of the civil justice system**

This phase focused on the consolidation of the audit findings and the objectives identified at the Access to Justice Conference. This included the proposing of solutions (together with the redrafting of the rules and legislation and implementations of the solutions immediately or in the medium or long term). It further focused on the procuring of funds for implementation of the suggested solutions and the development of systems. Phase 2 was set to commence during April 2012 and was targeted for finalisation by March 2013.

□ **Phase 3: Known as the ‘tapering off and maturity’ phase**

This was the final phase and was set to commence during April 2012 with the final evaluation during September 2013. This phase was dedicated to, and responsible for, the adaptation and development of infrastructure, systems implementation, monitoring, and implementation of the solutions developed in Phase 2. Once completed, there would be a final evaluation of the outcomes and impact.<sup>43</sup> For purposes of this research, no proof could be found that the final phase was concluded and what the outcome thereof was.

## 2.3 Access to justice

Poverty and unemployment still remain the leading threat to South Africa’s democracy. Improved access to justice will not resolve this issue but requires making the courts and the judiciary more accessible to poor and vulnerable communities.

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<sup>42</sup> Vahed “Access to Justice” *Advocate* 24(2):2-4.

<sup>43</sup> Vahed “Access to Justice” *Advocate* 24(2):2-4.

As was stated by the Honourable Minister of Justice and Constitutional Development, access to justice in the broader sense has become an internationally proclaimed concept which is used to define initiatives undertaken by governments to improve the lives of their most vulnerable communities. This means that there is a commitment by such governments towards the achievement of universal human rights and justice.<sup>44</sup>

Given the prescriptions of the Constitution of South Africa, there is a need to establish a way for current procedures to be modernised in order to give them a greater effect. This idea is well-considered when referring to access to justice.<sup>45</sup> In many respects the political, legal and social reforms on which the South African democracy are founded, were not supported with equal movements in terms of civil litigation, which is sometimes still based on outdated concepts of dispute resolution practices. ADR contributed to the modernisation of civil litigation in other jurisdictions, although not always with human rights as the objective.<sup>46</sup>

When referring to access to justice in a narrower sense, it refers to the mechanisms and processes to facilitate the obtaining of legal redress and commonly relate to the following:

- The development of appropriate legislation and programmes to strengthen the judicial system.
- The development of the rules of procedure to provide easier, speedier and affordable procedures to be followed in obtaining legal redress.<sup>47</sup>

In order to promote more effective access to justice for all the people of South Africa, various governmental and non-governmental organisations explored the different possibilities to provide affordable and appropriate dispute resolution bodies and procedures within the different communities of society. Some examples of these organisations are the Community Dispute Resolution Trust, the Community Peace Foundation, the Assessors Coordinating Committee, the Association of Arbitrators,

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<sup>44</sup> Radebe W 2011 "Address by the Minister of Justice and Constitutional Development: Access to Justice" [http://www.justice.gov.za/m\\_speeches/2011/20110708\\_min\\_ajc.html](http://www.justice.gov.za/m_speeches/2011/20110708_min_ajc.html) (accessed on 19 October 2017).

<sup>45</sup> Boule 2012:1.

<sup>46</sup> Boule 2012:2-3.

<sup>47</sup> Radebe R. 2011.

the Arbitration Foundation of South Africa, and Independent Mediation Service of South Africa.<sup>48</sup>

From the above discussion it is clear that access to justice is not merely concerned with the reform of the normal adjudication procedure, but also comprises all other methods aimed at providing more accessible justice. Therefore, available alternative mechanisms, such as arbitration, conciliation and mediation, undoubtedly fall within the broad spectrum of this approach. They are indeed a vital method of providing more effective access to justice to the individual.

The process of ADR and/or mediation will meaningfully contribute to providing access to justice in that it will be more affordable to the larger community who cannot afford prolonged litigation. By following the mediation or ADR processes they will have the opportunity to state their case in a safe and informal environment where they will be on equal terms to decide on an outcome that will benefit both parties.

## **2.4 Civil litigation procedures in South Africa**

The primary sources of South African law, in general, comprises the common law and statutory law. South Africa's common law is composed of the foundational Roman-Dutch legal principles as modified and interpreted by judicial precedent.<sup>49</sup> Damaska cited in SALC<sup>50</sup>, defined the South African justice system as “a system of adjudication in which procedural action is controlled by the parties and the adjudicator remains essentially passive”.

Procedure is the area of the law that deals with the enforcement of rights and in South Africa the civil justice system is based on an adversarial system.<sup>51</sup> Civil matters are private in nature and the court will not interfere. Therefore, the plaintiff in the matter will oversee initiating the process and take further steps by issuing summons or a notice of motion whereafter the matter will be set down for trial.<sup>52</sup>

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<sup>48</sup> SALC 1997:6.

<sup>49</sup> RSA Supreme Court of Appeal 2015 “History and background” <http://www.justice.gov.za/sca/historysca.htm> (accessed on 30 April 2017).

<sup>50</sup> SALC 2008 “Review of the law of evidence” <http://www.justice.gov.za/salrc/dpapers/dp113.pdf> (accessed on 30 April 2017).

<sup>51</sup> Pete *et al* 2009:1.

<sup>52</sup> Pete *et al* 2009:1.

In terms of the civil procedure, the rules and practices aim to bring disputes before the court to be adjudicated. Considering the adversarial nature of the civil justice system, the rules governing the civil procedure result in the depersonalising of disputes by making provision for legal representatives which act on behalf of the parties.<sup>53</sup> In addition to this, the litigation process is expensive. The procedures are so technical that the parties are not likely to succeed if they are not represented by attorneys and advocates, whose time come at a premium rate.

When there is a dispute, the first step will be to determine whether the aggrieved party has an enforceable right and, if so, whether that right has been encroached upon. If a right has been infringed, the next step will be to determine if there is a remedy available to the aggrieved party, as the general rule is that where there is a right there is a remedy (*ubi ius ibi remedium*).<sup>54</sup>

The next step would be to decide which court would be the best to grant the remedy. Consideration will therefore be given to the aspect of jurisdiction. The question on jurisdiction will be addressed prior to the commencement of proceedings and the choice of a competent court in turn affects the nature and manner of the proceedings.

The main courts with civil jurisdiction in South Africa are the following:

- The Supreme Court of Appeal.
- All High Courts.
- The magistrates' courts, which consist of the
  - district magistrates' courts, and
  - regional magistrates' courts<sup>55</sup>

The two main civil procedures in the South African civil justice system are action proceedings and application proceedings. Action proceedings envisage the presentation of facts and evidence verbally in court during the trial, and application proceedings constitute the presentation of facts and evidence in affidavits that will be read by a judge before hearing arguments in court on the issues raised by the parties in their affidavits.

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<sup>53</sup> Pete *et al* 2009:501.

<sup>54</sup> SASPS 2012 "Civil litigation" <http://paralegal.za.org/wp-content/uploads/2014/11/Civil-Litigation.pdf> (accessed on 22 August 2017).

<sup>55</sup> SASPS 2012 "Civil litigation".

Another difference between the two proceedings mentioned above is that application proceedings are usually heard in court shortly after their initiation, whereas action proceedings may be heard some years after their initiation. Application proceedings are usually disposed of more expeditiously than action proceedings. As a result, application proceedings are generally cheaper and lead to a relatively speedy resolution of disputes compared to action proceedings.<sup>56</sup>

Any order made against a party on an *ex parte* basis shall be of an interim nature and shall request the other party against whom the interim order was granted, to appear before the court on a specific return date to provide reasons why the order should not be confirmed.<sup>57</sup>

On the other hand, should the court not be able to make a decision on affidavits before it, the court may deem it necessary to call upon the deponent or any other witness to deliver oral evidence in court with the view of resolving the dispute at hand.<sup>58</sup>

#### **2.4.1 Litigation in terms of the action procedure**

The litigation process consists of three phases. The first phase starts with the drafting of pleadings after consultation with the client which will then be served on the respondent in the matter. The second phase is known as the pre-trial phase during which parties will identify issues in dispute and attempt to resolve the matter. Lastly is Phase 3 which is the trial phase. The dispute will revert to be adjudicated in open court should the parties not have been able to reach an agreement.

In order to institute litigation proceedings, pleadings or documents are exchanged between the parties, known as the plaintiff and the defendant. Rules 5 to 17 of the Magistrates' Court Rules<sup>59</sup> set out the process to be followed and also highlights the specific timeframes which parties to the dispute needs to comply with. It is noteworthy to mention that the High Court and the Magistrates' Court each have

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<sup>56</sup> *Mkwibiso V 2013 "Which road to choose? Action or Application" De Rebus*, 38 <http://www.saflii.org/za/journals/DEREBUS/2013/83.pdf> (accessed on 31 August 2017).

<sup>57</sup> Magistrates' Court Rules 2010 Rule 55. This process will contribute to a further delay in finalisation of the matter as there is a time-lapse between the granting of an interim order and the granting of the final order or setting aside of the interim order.

<sup>58</sup> Magistrates' Court Rules 2010 Rule 55.

<sup>59</sup> Magistrates' Court Rules 2010. Rules regulating the conduct of the proceedings of the Magistrates' Courts Act of South Africa <http://www.justice.gov.za/legislation/rules/rules.htm> (accessed on 31 August 2017).

their own set of rules; however, for the purpose and nature of this study, the main focus will be on the Magistrates' Court and the rules applicable thereto.

The mentioned documents comprise of the three fundamental pleadings for action procedure which are initiated by (a) filing a summons with the particulars of claim documents in support thereof. Following the summons, (b) the defendant must set out their defence in answer to the claim of the plaintiff in his or her plea, (c) to which the plaintiff will respond with his or her response thereto.<sup>60</sup>

An action becomes defended once the defendant files a notice of his or her intention to defend the matter. The defendant can thereafter enter his or her plea. Further particulars may be requested, which is additional facts or allegations to supplement the allegations already made in the pleadings. This information should be strictly necessary to enable a party to prepare for trial. The request for further particulars may be made by any party, but only after pleadings have closed. It is the pleadings which initially primarily determined what further particulars may be necessary. The idea is to prevent any party from being taken by surprise at the trial and further to establish what the other party intends to prove at the trial, since the pleadings alone may not necessarily establish this with sufficient accuracy.<sup>61</sup>

Therefore, during the litigation process, should there be any amendments that are made to the initial pleadings, it would lengthen the litigation process by serving notices of these amendments to all the parties and then later filing these amended pleadings at court 10 to 20 days after the notice of amendment.<sup>62</sup> Further processes which may prolong the litigation process would be where one of the parties does not comply with court rules. The opposing party may then institute additional procedures, which include the following:

- Applications to compel the non-compliant party to submit their plea.<sup>63</sup>
- Applications to strike out a defective pleading.<sup>64</sup>
- Applications to set aside an irregular procedural step.<sup>65</sup>
- Applications to raise an exception to a defective pleading.<sup>66</sup>

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<sup>60</sup> Magistrates' Court Rules 2010 Rule 21.

<sup>61</sup> Legal Wise 2013 "Civil matters & why they can take long" <https://www.legalwise.co.za/help-yourself/legal-articles/civil-matters-why-they-can-take-so-long-resolve> (accessed on 31 October 2017).

<sup>62</sup> Magistrates' Court Rules 2010 Rules 7 and 55A; rule 28 of the Uniform Rules of Court 2009 Rule 28.

<sup>63</sup> Magistrates' Court Rules 2010 Rule 60.

<sup>64</sup> Magistrates' Court Rules 2010 Rule 19.

<sup>65</sup> Magistrates' Court Rules 2010 Rule 60A.

Upon close of pleadings, the matter will then proceed to trial. On receipt of an application for a trial date, the registrar or clerk of the court takes the court file to the relevant magistrate to enable the latter to consider whether a pre-trial conference in terms of section 54 of the Magistrates' Court Act<sup>67</sup> is necessary, provided that the trial date be allocated within 10 days of receipt of the application for a trial date.<sup>68</sup>

The process for requiring the attendance of parties or their legal representatives at a pre-trial conference is done by a letter signed by the registrar or clerk of the court, together with a copy of the request, if there is any. The letters are then delivered by hand or per registered mail at least 10 days prior to the date set down for the said conference.<sup>69</sup>

The concept of a pre-trial conference is also governed in terms of Rule 37 of the Uniform Rules of Court 2009 for the High Court. The objective of the pre-trial conference is to limit the duration of trials,<sup>70</sup> narrow down issues in dispute<sup>71</sup>, and reduce costs.<sup>72</sup> The minutes of the conference must be documented and filed at court after the conference.<sup>73</sup> The following required points, in terms of Rule 37(6),<sup>74</sup> must be covered and documented at the pre-trial conference:

- The place, date and duration of the conference and the names of the persons present.
- If a party feels that he or she is prejudiced because another party has not complied with the rules of court, the nature of such non-compliance and prejudice.
- That every party claiming relief has requested his opponent to make a settlement proposal and that such opponent has reacted thereto.
- Whether any issue has been referred to by the parties for mediation, arbitration or decision by a third party and on what basis it has been so referred.
- Whether the case should be transferred to another court.

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<sup>66</sup> Magistrates' Court Rules 2010 Rule 19.

<sup>67</sup> Act 32 of 1944.

<sup>68</sup> Magistrates' Court Rules 2010 Rule 22.

<sup>69</sup> Magistrates' Court Rules 2010 Rule 25.

<sup>70</sup> *Bosman vs AA Mutual Insurance Association Limited* 1977 (2) SA 407 (C).

<sup>71</sup> *Filta-Matix (Pty) Ltd vs Freudenberg and Others* 1998 (1) SA 606 (SCA).

<sup>72</sup> *Lekota v Editor, 'Tribute' Magazine and Another* 1995 (2) SA 706 (W).

<sup>73</sup> Uniform Rules of Court 2009 Rule 37(7).

<sup>74</sup> Uniform Rules of Court 2009.

- Which issues should be decided separately in terms of Rule 33(4).<sup>75</sup>
- The admissions made by each party.
- Any dispute regarding the duty to begin or the onus of proof.
- Any agreement regarding the production of proof by way of an affidavit in terms of Rule 38(2).<sup>76</sup>
- Which party will be responsible for the copying and other preparations of documents.
- Which documents or copies of documents will, without further proof, serve as evidence of what they purport to be, which extracts may be proved without proving the whole document or any other agreement regarding the proof of documents.

The process and purpose of the process in the Magistrates Courts are similar to that of the High Court; however, same is subject to the decision of the magistrate as stated above or if a written request is received by either of the parties. The pre-trial conferences in the Magistrates' Courts are governed in terms of section 54 of the Magistrates Court Act<sup>77</sup> in conjunction with Rule 25 of the Magistrates' Court Rules of 2010. In terms of section 54 of the Magistrates Court Act the following issues can be discussed at the conference:

- The simplification of the issues.
- The necessity or desirability of amendments to the pleadings.
- The possibility of obtaining admissions of fact and of documents with a view to avoiding unnecessary proof.
- The limitation of the number of expert witnesses.
- Such other matters as may aid in the disposal of the action in the most expeditious and least costly manner.

Further to the above, Section 31 of the Superior Courts Act<sup>78</sup> provides that every superior court is a court of record. When referring to superior court, it includes the Constitutional Court, Supreme Court of Appeal, High Court or any other court with similar status as the High Court.

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<sup>75</sup> Uniform Rules of Court 2009.

<sup>76</sup> Uniform Rules of Court 2009.

<sup>77</sup> Act 32 of 1944.

<sup>78</sup> Act 10 of 2013.

This means that superior courts set precedent for lower courts, and therefore applying the doctrine of *stare decisis*.<sup>79</sup> Judicial decisions are therefore one of the essential sources in South African law and without available records of court decisions and a recognised hierarchy of courts, the doctrine of *stare decisis* would not be able to function effectively.<sup>80</sup>

Considering the factual exposition above, it is clear that the action procedure is a time-consuming process which ultimately has cost implications for both parties. The implementation of court-based ADR or mediation in the civil litigation process in South Africa would benefit from an empowering governing regime.<sup>81</sup>

#### **2.4.2 Proceeding to trial**

Once a matter is ready to proceed to court, it should be adjudicated in an open court.<sup>82</sup> At this stage, pleadings are considered to be closed and no further pleadings may be filed. Parties must then apply for a court date to have the matter placed on the role, which date should then be communicated to all relevant parties.<sup>83</sup> Depending on the nature and complexity of a matter, a case may take a few years to be finalised.<sup>84</sup>

The proceedings during the trial stage may be prolonged or postponed on numerous occasions, depending on how the court will exercise its discretion. This may be the result of procedural and/or material issues that may arise during the proceedings.<sup>85</sup>

Once a decision was made by the court, and one party is not satisfied with the outcome, he or she may proceed to lodge an appeal or review against the said decision. An appeal is grounded on the fact that the decision of the trial court was either wrong in law or wrong in fact.<sup>86</sup> This will result in additional cost and further time-consuming processes before reaching the conclusion of the dispute.

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<sup>79</sup> Courts must abide by or adhere to principles established by decisions in earlier cases. West's Encyclopedia of American Law 2008: *stare decisis*. Quoted in The Free Dictionary by Farlex. <http://legal-dictionary.thefreedictionary.com/stare+decisis> (accessed on 14 August 2017).

<sup>80</sup> Maclons 2014:39.

<sup>81</sup> Boule 2012:7.

<sup>82</sup> Superior Courts Act 10 of 2013 Sec 32; Constitution 1996 Sec 34.

<sup>83</sup> Magistrates Courts Rule 2010 Rule 55.

<sup>84</sup> Pete *et al* 2011:99-100.

<sup>85</sup> Meintjes-Van der Walt *et al* 2008:508 -511.

<sup>86</sup> SASPS 2012 "Civil litigation" <http://paralegal.za.org/wp-content/uploads/2014/11/Civil-Litigation.pdf> 31 (accessed on 22 August 2017); Magistrates' Court Rules 2010 Rule 51.

Modern litigation is therefore changing and adapting to the social and economic pressures and it is not anymore only about confrontation of parties and victory of one.<sup>87</sup>

### **2.4.3 Litigation in terms of the application proceedings<sup>88</sup>**

Equal to an action procedure, pre-court proceedings with respect to application procedures commence with three fundamental documents which are exchanged between parties during intervals, ranging from 10 to 20 court days between the services of each of these documents on each party.<sup>89</sup> The applicant will begin the litigation process by serving a notice of motion and founding an affidavit on the other party known as the respondent. The latter will then respond with a notice of intention to oppose the matter, as well as his or her answering an affidavit addressing issues raised in the founding affidavit.<sup>90</sup> There can be various reasons that may contribute to the lengthening of the procedure, such as the amendment to initial affidavits. Should there be delays from one party, similar processes as in the action procedure are followed, where a notice is delivered to compel the party in default to submit their documents, alternatively to strike out a non-compliant affidavit.<sup>91</sup> It is noteworthy to mention that not all disputes in terms of the application procedure is susceptible to be resolved by mediation. An example of such disputes is where the nature thereof is related to a specific point of law.

## **2.5 Mediation versus litigation**

When referring to successful mediation, it ultimately means that a dispute was resolved by the disputants reaching a mutually satisfying settlement agreement with the assistance of an impartial mediator. The focus of litigation is mainly on adjudication of the factual and legal issues between the parties by a presiding officer who delivers a judgement.

The willingness of the parties to take part in the mediation process is ultimately the most important requirement to ensure a successful outcome where relationships are restored and communication between parties promoted.

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<sup>87</sup> Boule 1997:32.

<sup>88</sup> Maclons 2014:40.

<sup>89</sup> Rule 55 of the Magistrates' Court Rules 2010 Rule 55.

<sup>90</sup> Rule 55 of the Magistrates' Court Rules 2010 Rule 55.

<sup>91</sup> Rule 55 of the Magistrates' Court Rules 2010 Rule 55.

Mediation gives parties an opportunity to reconsider all the issues identified in an unthreatening atmosphere, as the process is not bound by the rules and procedure that dominates the adversarial system of litigation. Another important element of mediation is that it is done confidentially and without prejudice.<sup>92</sup>

### **2.5.1 How is the mediation process different to the litigation process?**

Although there are numerous definitions of mediation on both the internet and textbooks, the most essential elements constituting mediation are apparent from the definition provided by John Isaacs, a practicing mediator in New Zealand, namely:

- Consensual process.
- Existing dispute (or opposing interest).
- Independent and objective third-party intervention between the disputing parties.
- Negotiation under guidance of a mediator.
- Aim is a mutually acceptable settlement of the dispute.<sup>93</sup>

What some of the definitions fail to mention is the fact that the mediation process aims to minimise the participation of legal practitioners during the mediation on behalf of their clients. It will, however, not be possible to entirely exclude lawyers from the process as they will have to be part of the finalisation of the settlement. Negotiation is a component of mediation and although there is flexibility in the process, one cannot deny the rituals embodied in the negotiations. In the litigation process parties will engage from a positional bargaining point which is based on the outcome needed. The challenge here is that the actual bargaining range will then have to be extended in order to meet each other halfway.<sup>94</sup>

The settlement agreement may, however, be made an order of court which will give the power to parties to enforce the implementation thereof.<sup>95</sup>

Costs are an important issue for disputants and are often the main reason that parties explore alternative forms of dispute resolution in a particular mediation, in order to resolve their disputes in a cost-effective manner.<sup>96</sup> The main requirement

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<sup>92</sup> Vettorri 2015:358.

<sup>93</sup> John Isaacs cited by Marnewick 2015:12.

<sup>94</sup> Goodman 2016.

<sup>95</sup> Marnewick 2015:12.

<sup>96</sup> Feehily 2009:291.

currently is that both parties must be willing to engage in the process. otherwise mediation will not achieve the objective of resolving a dispute in the shortest time and most cost-effective way.

Often defendants are intentionally uncooperative in this process to promote their interest to some extent, resulting in higher costs and prolonged litigation.<sup>97</sup> It is in circumstances such as these that assistance is required from the courts, which need to be equipped with the necessary authority to use mediation as a costs-containment device in order to bring often reluctant and unwilling parties together.

Due to an increase in the number of disputes ending up in litigation, the court roles have become overburdened. This results in extensive waiting periods before matters appear before court and is a further infringement of access to justice.<sup>98</sup>

### **2.5.2 Advantages of the mediation process**

There are various advantages to taking part in mediation rather than the normal litigation process, which include but are not limited to:<sup>99</sup>

- The mediation process is conducted in a private setting and the discussions during the process are regarded as confidential. As mentioned earlier, this is a flexible process which is conducted in an informal manner. During normal litigation, the proceedings are conducted in an open court in front of the other legal representatives and the public. In some instances, even the media will be allowed in the court room.<sup>100</sup>
- Unclogging of congested court roles. The mediation process is indisputably a quicker process than what litigation and arbitration proceedings are.<sup>101</sup> The delay in finalising cases is what causes the congested court roles.
- Expediting the conclusion of civil disputes by optimising the effective use of resources.
- Possible saving in cost for litigants as well as the courts. One of the reasons that can make litigation cases very expensive is due to the protracted procedure that must be followed.

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<sup>97</sup> Feehily 2009:291.

<sup>98</sup> McClons 2014.

<sup>99</sup> Boulle 2012:3-4.

<sup>100</sup> Marnewick 2015:15.

<sup>101</sup> Marnewick 2015:15.

- It will improve the management of heavy caseloads by judicial officers.
- Even if the mediation process was not successful, the parties know exactly what the outcome is as they have been in control of the process. The option of going to court is still available to them. On the contrary, the outcome of a litigation process is not so certain. The outcome may be in favour of either party and can still be taken on appeal should one of the parties not be satisfied with the outcome. It is only after the final appeal process was followed and the court made a decision, that the parties will have certainty about the outcome of the litigation process. Arbitrations follow the same uncertain route than litigation, only to a lesser extent.<sup>102</sup>

From the information above, it is clear that mediation is definitely a more cost- and time-effective process to follow where parties have more certainty of the end result and how that will impact their lives.

### **2.5.3 Disadvantages of mediation**

Although there are numerous advantages for parties to follow ADR processes, it should not be mistakenly seen as a process without flaws. ADR and mediation can both have disadvantages, but they are outweighed by the advantages of mediation. Nonetheless, cognisance must be taken of the disadvantages in order to present balanced perspectives in this study.

One of the disadvantages is that the parties agreeing to mediate should be fully honest with each other. The element of honesty can become problematic, especially when the cause of the dispute was dishonesty by either one of the parties. One party might possibly attempt to deceive the other party one more time during the mediation process. Very little can be done to remedy such a negative aspect as this one.<sup>103</sup>

Another disadvantage of mediation is the enforcement of the agreement should it not have been made a court order. The agreement between the parties will therefore be regarded as a contract and the normal contractual obligations and remedies are available. The agreement alone, however, will not be enough to enforce the performance of the parties as they will have to follow the litigation process to enforce compliance with the agreement. A possible remedy is thus to obtain consent to

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<sup>102</sup> Marnevic 2015:15-16.

<sup>103</sup> Marnevic 2015:17.

judgement or, alternatively, an acknowledgement of debt. It might pose a problem as parties who already agreed to mediate might be reluctant to sign a second document to bind him or her to the agreement. It will, however, ultimately speed up the finalisation of the agreed upon outcome.<sup>104</sup> The following are a few disadvantages which, according to the literature, is applicable to ADR. In this instance it will also be applicable to mediation as a form of ADR.

□ **Absence of court protection**

When parties agree to take part in the mediation process, the court is not part thereof. The parties therefore waive the protection they might have had during a trial where an experienced judicial officer and also their legal representatives protect their individual rights.<sup>105</sup>

□ **Possible double cost**

The possibility will always be there that the mediation process will not be successful, and the dispute remains unresolved. This will result in the parties having to approach the court to finally assist in resolving the dispute by way of a formal process.<sup>106</sup>

□ **Limited information**

Because the normal court procedures are not followed, there is no requirement for either party to disclose the information which his or her case is based on. The parties are therefore limited in the information they have about the opposing party's case.<sup>107</sup> This may to some extent limit the parties to take an informed decision as they only have information available to them which the other party allowed them to have for purposes of the mediation.

□ **Prescription**

Litigation proceedings must be instituted before a specific period has lapsed. Should this not be done in time, the prejudiced party will legally be barred from initiating any further civil action. Parties may take longer than expected to mediate and ultimately resolve the dispute, which may lead to prescription. There are, however, some remedies available in this instance which will assist by

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<sup>104</sup> Marnewick 2015:17.

<sup>105</sup> Pete *et al* 2009:510.

<sup>106</sup> Pete *et al* 2009:510.

<sup>107</sup> Pete *et al* 2009:510.

interrupting or stopping the prescription period. An example hereof is where one party acknowledges his or her liability in terms of the dispute.<sup>108</sup>

#### □ **Uncooperative parties**

The mediation process is more likely to be successful if both parties are willing and cooperative during the process. Should one party rather prefer a court decision over a mediation agreement, it will be a futile exercise to go through mediation knowing that it will not have a favourable outcome.<sup>109</sup>

## **2.6 Status of mediatory provisions in South Africa**

The mediation process in South Africa was formerly not totally non-existent as it has a long history in our country. Previously, the traditional African communities seldom enforced sanctions where there was contravention of the customary law. Instead, they made use of “agreed upon corrective mechanisms”. The fundamental part of their dispute resolution process was based on the general principle of *ubuntu*. This concept focuses on building communities, respect, compassion, acts of kindness, communication and consultation.<sup>110</sup>

Throughout the years the legal system slowly moved away from the expensive, stressful and time-consuming legal process as the only method to be considered for settling most disputes.<sup>111</sup> A drastic change in the resolution of disputes came about in South Africa when mediation was introduced into the Magistrates’ Court Rules with effect from 01 December 2014, as published in the Government Gazette 37448.<sup>112</sup>

In October 2014, the Department of Justice introduced court-annexed mediation as a pilot project in selected sites throughout South Africa. This process is governed by the Magistrates’ Court Rules.

Parties can make use of the mediation procedure before or during the commencement of the formal proceedings in order to resolve a dispute at hand.<sup>113</sup> The mediator then acts as a facilitator and not as adjudicator or judge. The role of

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<sup>108</sup> Pete *et al* 2009:510.

<sup>109</sup> Pete *et al* 2009:510.

<sup>110</sup> Brand *et al* 2012:1. 1

<sup>111</sup> Sardwalli 2015 “Mediation aims to save money, make justice accessible to all” 15 <https://www.pressreader.com/south-africa/sowetan/20150303/281835757159216> (accessed on 20 October 2017).

<sup>112</sup> Marnewick 2015:

<sup>113</sup> Magistrates’ Court Rules 2010 Rule 75.

the mediator is also not a matter for imposing decisions on the parties to the dispute, as the important or key resolutions are agreed upon by the parties themselves. The mediators, however, can advise and consult with the parties individually to assist in ensuring a mutually agreeable solution to the issue at hand.<sup>114</sup>

As mentioned in Chapter 1, there are currently about 49 statutes in South Africa which makes provision for mediation in some or other form. In most cases these acts are empowering and/or facilitative in respect of the mediation process; however, they impose no sanction for the failure to attend and/or participate in the process.<sup>115</sup> Due to fact that the ambit of this research is limited to court-annexed mediation in the Magistrates' Court, only brief mention of other areas of the law where mediation is applicable, is made in the following sections for contextual purposes.

### **2.6.1 Mediation in the employment sector**

The most widespread area in the law for mediation is within the employment disputes. In terms of the preamble of the LRA<sup>116</sup> simple procedures are provided to resolve labour disputes via the CCMA. The focus of the dispute resolution system is therefore supported by the establishment of the CCMA under the LRA.<sup>117</sup> Prior to the CCMA, labour disputes were settled in what was known as the Industrial Courts, which did not make provision for any form of ADR.<sup>118</sup> The LRA of 1956 was subsequently repealed and replaced with the current LRA of 1995 which indeed makes provision for ADR.

The CCMA is an independent juristic body, which is mainly funded by the government. Part of its governing body is stakeholders from government, business and labour, each with three representatives.<sup>119</sup> One of the objectives or purposes of the LRA<sup>120</sup> is to provide an easy procedure for the resolution of employment disputes through statutory conciliation, mediation and arbitration. It is for that purpose that the CCMA was established.

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<sup>114</sup> Gould & Elliot 2016 "Mediation guide – the basics" <https://www.fenwickelliott.com/research-insight/articles-papers/alternative-dispute-resolution/mediation-guide-basics> (accessed 31 July 2017).

<sup>115</sup> Tokiso Dispute Settlement "The dispute resolution digest" 2015:49.

<sup>116</sup> Act 66 of 1995.

<sup>117</sup> Act 66 of 1995.

<sup>118</sup> Maclons 2014:59.

<sup>119</sup> Department of Labour "Basic guide to the Commission of Conciliation, Mediation and Arbitration" <http://www.labour.gov.za/DOL/legislation/acts/basic-guides/basic-guide-to-the-commission-for-conciliation-meditation-and-arbitration-ccma> (accessed on 29 August 2017).

<sup>120</sup> Act 66 of 1995.

## **2.6.2 The functions of the Commission for Conciliation, Mediation and Arbitration**

The main function of the CCMA is to attempt to resolve disputes through conciliation or arbitration. A further responsibility of the Commission is to publish information on its activities and guidelines for dispute resolutions. The rules regulating the processes followed, are determined by the Commission whereafter it is published in the Government Gazette.<sup>121</sup>

## **2.6.3 Appointment of commissioners at the Commission for Conciliation, Mediation and Arbitration**

The governing body of the CCMA will appoint commissioners who are sufficiently qualified to perform their functions as commissioners in accordance with the Act. Although not all the commissioners are appointed on a full-time basis, they are appointed for a fixed term as determined by the governing body of the Commission. The main factor is to keep in mind that any appointment should be in line with the need of the Commission to have representatives that are equally represented in race and gender. Should the commissioner not be a senior, he or she will be appointed for a probationary period. The code of conduct, remuneration and disciplinary procedures of the commissioners are further also determined by the governing body.<sup>122</sup>

In terms of the CCMA rules, conciliation proceedings may not be disclosed to any other party. It should be mentioned that mediation and conciliation are two different processes as mediation does not take place during a CCMA process. Rule 16 of the CCMA states as follows:

- Conciliation proceedings are private and confidential and are conducted on a basis of without prejudice. No person may refer to anything said at conciliation proceedings during any subsequent proceedings, unless the parties agree in writing.

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<sup>121</sup> Department of Labour "Basic guide" 2007.

<sup>122</sup> Act 66 of 1995.

- No person, including a commissioner, may be called as a witness during any subsequent proceedings in the Commission or in any court to give evidence about what transpired during conciliation.<sup>123</sup>

The LRA<sup>124</sup> requires a party to request mediation but does not insist that that party attend and/or participate during the process. Section 157 (4) of the LRA states that the Labour Court may refuse to determine a dispute based on the fact that the latter should be satisfied that a proper attempt was made to resolve the dispute by way of conciliation and/or mediation. In the case of NUMSA vs Driveline Technologies the court held that:

in effect that the Labour Court “clearly has jurisdiction” to adjudicate a dispute which has not been referred to conciliation but it has a discretion to refuse to adjudicate it if it is not satisfied that an attempt has been made to resolve the dispute through conciliation. He says it is up to the Labour Court to decide whether it adjudicates it or not.”<sup>125</sup>

Arbitration remains an adjudicatory process as the arbitrator is just a substitute for a judge, and, while the parties may agree on a simplified process, they will end up with a win-lose situation as a result of a decision imposed on them.

#### **2.6.4 Commercial dispute resolution**

The development or implementation of mediation in this sector is not as rapid as in other areas of the law. According to Brand *et al.*<sup>126</sup>, one of the reasons might be the belief that by following the mediation process it might reflect a sign of weakness or indecisiveness by either of the parties.

#### **2.6.5 Administration of black affairs prior to 1994**

During the apartheid era, there was a separate legal system in place administrating matters which related to African people. The courts dealing with such cases were commonly known as the Commissioners Courts which rendered services very similar to those of the Magistrates Courts. The commissioners were limited to only adjudicating matters which related to Africans and applied indigenous law and

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<sup>123</sup> Labour Protect n.d. “Rules for the conduct of proceedings before the CCMA [https://www.labour-protect.co.za/ccma\\_rules.htm](https://www.labour-protect.co.za/ccma_rules.htm) (accessed on 31 August 2017).

<sup>124</sup> Act 66 of 1995.

<sup>125</sup> National Union of Metalworkers of South Africa v Driveline Technologies (Pty) Ltd and Another (J324/97) [1999] ZALC 157 (11 October 1999).

<sup>126</sup> Brand *et al* 2012:4.

customary law on condition that these were not in direct conflict with vital principles in general law such as statutes and the Roman-Dutch law.<sup>127</sup>

Mediation in these courts was seen as an add-on to ordinary litigation and was thus available to disputing parties. Parties were given the opportunity whether they wanted to make use of the process, irrespective if it was in a civil or criminal matter.<sup>128</sup> No rules or prescripts were in place to regulate the functioning of these courts, and the proceedings were conducted in a very informal manner.

### **2.6.6 Unlawful occupation of land**

Section 7 of the Prevention of Illegal Evictions Act<sup>129</sup> makes provision for mediation in that it states the following:

Section 7(1) states that if the municipality in whose area of jurisdiction the specific land in question is situated, is not the owner of the said land, the municipality can appoint a person with the necessary expertise in dispute resolution to facilitate the meetings of the interested parties with the objective to mediate and settle any dispute in terms of this Act. The parties can further, by agreement, appoint another person to facilitate meetings or mediate a dispute, on the conditions determined by the municipality. Should the municipality be the owner of the land in dispute, the premier of that particular province will appoint someone to facilitate the meetings and try to settle the dispute in terms of this Act. It is interesting to note that section 5 of the act determines that all discussions, disclosures and submissions which are made during the mediation proceedings will remain privileged, unless the parties agree to the contrary. This specific requirement seems to be the same during any mediation process.

In this instance, the parties are unfortunately not at liberty to either make their own decisions or control the process as this delegation lies with the municipality and/or executive council.

### **2.6.7 Family matters**

The South African judiciary realised that the cold and unfriendly court environment and the subsequent court orders, are not necessarily the best way to resolve

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<sup>127</sup> Marnewick 2015:5-6.

<sup>128</sup> Marnewick 2015:5-6

<sup>129</sup> Act 19 of 1998.

matters, especially where children are affected. They are unfortunately the innocent bystanders between two opposing parties. The limitations associated with the adversarial litigation system have become firmly acknowledged and mediation seems to have become a preferred procedure as an effective dispute resolution mechanism.<sup>130</sup>

The current challenges in the family law system can be summarised as follows:

- An unfortunate hierarchy of courts exists.
- There is a multiplicity of forums (courts) with a concomitant duplication of resources and costs.
- There is a lack of adequate ADR machinery for family disputes.
- Some substantive issues of law also need to be addressed.<sup>131</sup>

The obligatory practise of mediation within the field of family law is presently affected through statutes found within this area of law. An example of such a statute is the Mediation in Certain Divorce Matters Act 24 of 1987. This piece of legislation requires the compulsory process of mediation and its purpose is to protect the best interests of children in the event of a divorce. It further determines that the report with recommendation of the family advocate be considered prior to the decree of divorce be granted. The family advocate is also appointed in terms of this act.<sup>132</sup>

The objective of the family advocate is to conduct an enquiry so as to be able to provide the court with a report and possible recommendations concerning the well-being of the minor or dependent child of the marriage concerned.<sup>133</sup> The enquiry in this circumstance establishes a mediation process in some sense which can be compulsory in nature.

In 2005, the Children's Act 38 of 2005 was approved and came into operation in June 2007. The Act acknowledges the significance of family relationships, and as such encourages and directs mediation processes and procedures in a number of key areas.

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<sup>130</sup> SALC 2015:6

<sup>131</sup> SALC 2015:6-7.

<sup>132</sup> Act 24 of 1987 Sec 2.

<sup>133</sup> Act 24 of 1987 Sec 4.

When reading the Act, the word 'mediation' does not feature so often in the provision. However, reference is made to the participation of the family advocate which actually refers to a meeting or consultation with the family advocate. In terms of section 21 (3)(a) of the Children's Act, a matter can be referred to the family advocate for mediation where there is a dispute between the biological father and biological mother in respect of the fulfilment of certain responsibilities. After an application was lodged with a court, any party, or the court itself, can demand the family advocate to conduct an 'enquiry' to determine what the best interests of the child concerned would be.<sup>134</sup> The family advocate will then assist the parties to reach an agreement on the disputed issues such as care, contact and guardianship of the minor children. If, however, the parties are not able to reach an agreement, the family advocate will evaluate the parties' circumstances by way of interviewing both, as well as the minor child or children, whereafter a recommendation is made to the court.<sup>135</sup>

It is noteworthy that previously lawyers ignored non-legal issues such as the social challenges present during a divorce action. For them it would merely be a legal event, which contributed to the fact that divorce matters became problematic in South Africa. As a result of the adversarial nature of the litigation process in divorce matters, parties are more likely to be bitter and relationships irreconcilable.<sup>136</sup>

In the case of *Van der Berg v Le Roux*<sup>137</sup> the issue before the court related to a variation order in terms of custody of a minor child. The parties were ordered to first mediate the issue privately, and only after the mediation process had been finalised, either party could request a competent court to decide over the matter.

Although legislation makes provision for mediation, it is not to such an extent that it be fully applied. The court often notices the benefits of mediation, especially in family law matters, and encourage parties to consider the mediation process.

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<sup>134</sup> Paleker 2008 "Mediation in South Africa's new Children's Act: A pyrrhic victory" [http://www.asiapacificmediationforum.org/resources/2008/7-Mohamed\\_Paleker.pdf](http://www.asiapacificmediationforum.org/resources/2008/7-Mohamed_Paleker.pdf) (accessed on 31 August 2017).

<sup>135</sup> RSA DoJ&CD "The office of the family advocate" [http://www.justice.gov.za/FMAdv/f\\_main.htm](http://www.justice.gov.za/FMAdv/f_main.htm) (accessed on 26/11/2017).

<sup>136</sup> De Jong 2014: An acceptable, applicable and accessible family-law system for South Africa - some suggestions concerning a family court and family mediation <http://hdl.handle.net/10500/21648> (accessed on 31 August 2017).

<sup>137</sup> 2003 (3) ALL SA 599 (NC).

## 2.7 The purpose of mediation in the justice system

The simplicity of the process in which disputes can be resolved using the court-annexed mediation system is, above all, the greatest benefit to our society. The purpose of the mediation process is much broader than just family and labour disputes as discussed earlier.

The main purposes of mediation as contained in the preamble of the court-annexed rules are to:

- Promote access to justice.
- Promote restorative justice.
- Preserve relationships between litigants or potential litigants which may become strained or destroyed by the adversarial nature of litigation.
- Facilitate an expeditious and cost-effective resolution of a dispute between litigants or potential litigants.
- Dispense with litigation procedures and rules of evidence.
- Provide litigants or potential litigants with solutions to the dispute, which are beyond the scope and powers of judicial officers.<sup>138</sup>

The process can further be used for several other purposes, including the following:

### **To identify issues**

Mediation can be used to assist parties to identify which issues are in dispute at a very early stage. The process, also known as scoping, and parties are not forced to settle during this stage. This part of the process is mainly there to set the boundaries, and it not focussed on the outcome or decisions taken by the parties at the end.<sup>139</sup>

### **To settle disputes**

When there is a dispute between parties, mediation can be used in an endeavour to resolve the problems between them. Although the main focus will be to bring the parties to a point where they reach consensus, the dispute may not be resolved. The mediation might then at least contribute to handle or manage the process to be followed from thereon to resolve the dispute.<sup>140</sup>

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<sup>138</sup> GoLegal 2016. "Court-annexed mediation rules of the magistrates' courts". <https://www.golegal.co.za/wp-content/uploads/2016/12/Court-Annexed-Mediation-Rules-of-the-Magistrates-Courts.pdf> (accessed on 07 November 2017).

<sup>139</sup> Boule 1997:11.

<sup>140</sup> Boule 1997:11.

### □ **For conflict management**

The process of mediation can also be used to manage conflict even though the conflict may still continue. Through mediation, acceptable rules and structures can be put in place in order to minimise further on-going disputes. This process will then assist with communication and interaction between parties.<sup>141</sup>

### □ **Formulation of contracts and policies**

Parties who are in negotiation to formulate contracts or policies may make use of a mediator to assist with the process. The process will then allow all stakeholders who have an interest in the matter, to participate in the process.<sup>142</sup>

Dispute resolution in South Africa drastically changed when mediation was introduced into the Rules Regulating the Conduct of Proceedings in the Magistrates Court.

## **2.8 Conclusion**

From the investigation and discussion above it would be safe to surmise that the civil justice system and the civil litigation procedures are ineffective, time-consuming and costly.

The goal of broadening access to justice for citizens and the community in general is not being achieved due to the constraints of the civil justice system. The delays caused by the procedural constraints, the overburdened courts system and the crippling costs of litigation to government and citizens alike are the main reasons for the investigation of alternative methods of dispute resolution.

Alternative dispute resolution mechanisms in general, and mediation specifically, have the potential to, at the very least, assist in providing more effective and cost-efficient solutions for civil disputes. Mediation does not only provide a speedy and affordable way in which to resolve a dispute between the parties involved, but also has the added advantage of decongesting court roles. The effect of this is enhancing access to justice to the public because deserving matters are heard and finalised quicker with the concomitant cost-saving for the justice system and taxpayer.

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<sup>141</sup> Boule 1997:11.

<sup>142</sup> Boule 1997:12.

## COMPARISON OF COURT-ANNEXED MEDIATION IN DIFFERENT JURISDICTIONS

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### 3.1 Introduction

The jurisdictions of Canada and Indonesia, where mandatory mediation has been implemented, are compared to that of South Africa to evaluate the implementation of an established mediation system as a preferred method of dispute resolution in an adversarial civil justice system. The purpose is to gain insight in the successes and failures in these jurisdictions and to assist in establishing the mediation system in South Africa.

### 3.2 Jurisdictions of Canada and Indonesia

#### 3.2.1 Canada

Canada's legal system is based on the English and French systems.<sup>143</sup> Their courts systems are complex, and each province and territory have their own courts. The Supreme Court of Canada ultimately is the head of the entire system.<sup>144</sup>

Similar to South Africa, Canada also identified challenges affecting the civil justice system, which accumulated over the years. The challenges include delays in finalisation of matters and cost, not only for the parties involved, but also for the government in terms of the expenses to run the justice system. The need for access to justice to defend a person's rights in court reached the top of their priority list.<sup>145</sup>

The Canadian government became convinced that the increased use of mediation will enhance access to justice, and will somehow address issues on the delay, cost and complexity of cases dealt with through the civil justice system. The process is

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<sup>143</sup> Government of Canada Department of Justice 2017 "About Canada's System of Justice" <http://www.justice.gc.ca/eng/csj-sjc/just/index.html> (accessed on 06 December 2017).

<sup>144</sup> Government of Canada Department of Justice 2017 "How does Canada's court system work?" <http://www.justice.gc.ca/eng/csj-sjc/ccs-ajc/01.html> (accessed on 06/12/2017).

<sup>145</sup> McHale 2000 "Uniform Mediation Act" Discussion paper" [http://www.cfcj-fcjc.org/sites/default/files/docs/hosted/17494-uniform\\_mediation.pdf](http://www.cfcj-fcjc.org/sites/default/files/docs/hosted/17494-uniform_mediation.pdf) (accessed on 31 August 2017).

therefore also less stressful for litigants and the outcomes of cases more successful.<sup>146</sup>

Mediation in Canada has largely developed over time in the context of civil proceedings, as well as proceedings under specialised legislation, such as the labour relations legislation and human rights legislation.<sup>147</sup> Courts have requested litigants to take part in the mediation process. Provisions supporting these requests are now enshrined in legislation, court directives and rules. The referral of parties to mediation ultimately also alleviates the overburdened courts.<sup>148</sup>

In the normal day-to-day life, parties resort to mediation once a predetermined obligation or relationship, such as a contract, fails. Should there be a contract between the parties, and it is not explicitly stated in the contract that the parties should take part in a mediation process, they will first have to agree to take part in the mediation process. This agreement to mediate should be in writing.<sup>149</sup> The mediation clerk will then assist to appoint a mediator where the parties cannot come to an agreement.

The question, however, remained whether the mediation clause would be legally enforceable and what remedy would be available should one party not comply with the contract. This was not yet specifically addressed by the courts; however, in as far as the legal commentators in Canada is concerned, these clauses in contracts would not be so strictly enforced as an arbitration clause in the contracts would have been.<sup>150</sup>

The stance in relation to appointment of mediators is similar to what it is in South Africa as it remains the responsibility of the parties, once agreed, to take part in the process to appoint a mediator of their choice.<sup>151</sup> Should it however happen that the parties cannot agree on a mediator, the mediation organisations can be approached to assist to appoint a mediator who will then determine the terms of the procedure, the date, time and place where the mediation will take place.<sup>152</sup>

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<sup>146</sup> McHale 2000:4.

<sup>147</sup> Mills & Dales 2017 "Mediation – Canada" <https://gettingthedealthrough.com/area/54/jurisdiction/7/mediation-canada/> (accessed on 01 November 2017).

<sup>148</sup> Klause & Steffek 2013:924.

<sup>149</sup> Klause & Steffek 2013:918.

<sup>150</sup> Klause & Steffek 2013:918–919.

<sup>151</sup> Klause & Steffek 2013:919.

<sup>152</sup> Klause & Steffek 2013:919.

The manner in which mediation fees are determined, differs from how it is done in South Africa<sup>153</sup>. In Canada, mediators can negotiate their fees freely with the parties. The “Code d’Ethique des Mediateurs” issued by the L’Institut de Mediation et d’Arbitrage du Quebec, for instance, states that mediators should consider the complexity of the dispute, the time and effort spent to resolve the issues, as well as the cost of similar mediations. The parties will generally share the cost of the mediation, unless it was agreed otherwise.<sup>154</sup> The conduct of mediators is regulated by the mediation organisations to ensure that proper processes are followed to safeguard both parties.<sup>155</sup> In 2003, the Law Commission of Canada recommended that education in ADR should be strengthened for judges. Universities and law schools were also encouraged to strengthen their education on ADR for students. Initially, there were no statutory provision in the Canadian Law that extensively regulates the training and qualifications of mediators and thus the profession is not legally protected.<sup>156</sup> The position changed specifically in respect of the family law mediators.

The Canadian Federal Legislature amended several statutes to include the option of referring matters to mediation in order to avoid expensive and dragged out litigations. A total of 31 statutes now make provision for the mediation process to be considered.<sup>157</sup> A few examples of the implementation of mediation in specific areas in Canada are set out below, referring to some provinces in Canada and how they apply this process.

In **Saskatchewan**<sup>158</sup>, section 54(2) of the Queen’s Bench Act<sup>159</sup> requires that parties in a non-domestic or family civil dispute should attend mediation sessions before any further steps are taken. The registrar will then arrange for a mediation session to take place after the close of pleadings. Skilled mediators are used during this

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<sup>153</sup> Fees in terms of Court-Annexed Mediation are regulated by the Act; however, mediation in the private sector is not regulated and as such the logic inference to be drawn is that fees for mediation in the private sector can be negotiated between the parties and the mediator.

<sup>154</sup> Klause & Steffek 2013:919.

<sup>155</sup> Klause & Steffek 2013:919.

<sup>156</sup> Klause & Steffek 2013:923.

<sup>157</sup> Klause & Steffek 2013:924.

<sup>158</sup> Saskatchewan is a Canadian province that borders the United States to the south. The population as on 01 October 2017 was 1.13 million. (accessed on 31 August 2017).

<sup>159</sup> Government of Saskatchewan “The Queen’s Bench Act, 1998. Chapter Q-1.01 of the Statutes of Saskatchewan, 1998” <http://www.publications.gov.sk.ca/freelaw/documents/PIT/Statutes/Q/Q1-01-2004-08-23.pdf> (accessed on January 2018); McHale MJ 2000 “Discussion Paper, Uniform Mediation Act” [http://www.cfcj-fcj.org/sites/default/files/docs/hosted/17494-uniform\\_mediation.pdf](http://www.cfcj-fcj.org/sites/default/files/docs/hosted/17494-uniform_mediation.pdf) (accessed on January 2018).

process to assist the parties in reaching an agreement. Since the introduction of the mediation process, an on-going increase was noted over the years in respect of the number of cases resolved through civil mediation. In 2007–2008, 53% of civil cases were resolved by making use of the mandatory civil mediation process.<sup>160</sup>

In **Ontario**,<sup>161</sup> reference to mandatory mediation is made in the Courts of Justice Act.<sup>162</sup> The programme is developed to assist parties involved in civil litigation to attempt to settle their cases before they have to go to trial, thus saving them both time and money.<sup>163</sup> This approach is similar to that of Saskatchewan. In Ontario, the Family Statute Law Amendment Act 2006 was passed in order to amend both the Family Law Act 1990 and the Arbitration Act 1991 in relation to family arbitrations.<sup>164</sup> The newly outlined process in the 2006 Act moved away from the arbitration policy as well as the recognised advantages related to the arbitration process towards a process which is more regulated in terms of the Canadian principles of equality and more protective towards the vulnerable party.<sup>165</sup>

Mediation is also implemented in **Québec**<sup>166</sup> where the Superior Court supports the requirement of Bill 65 of 1996 that parties who have children and who want a divorce and/or separation should attend at least one mandatory mediation session.<sup>167</sup> The law of Québec has a somewhat different view when it comes to mediation proceedings. Art 814.3 of the Code de Procédure Civile du Québec requires that prior to filing an application with the court on any family dispute such as division of property or maintenance, the parties must first attend an informal session with the family mediator who will inform them of the process of mediation.<sup>168</sup> Although still voluntary, the parties are required to actively take part in the process in good faith

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<sup>160</sup> Canadian Forum on Civil Justice 1995 “Saskatchewan Queens Bench mandatory mediation” <http://www.cfcj-fcjc.org/inventory-of-reforms/saskatchewan-queens-bench-mandatory-mediation> (accessed on 31 August 2017).

<sup>161</sup> Ontario is a province in east-central Canada that borders the U.S. and the Great Lakes. The capital city is Toronto and the population as on 01 January 2014 was 13.6 million. <https://www.ontario.ca/page/about-ontario> (accessed on 31 August 2017).

<sup>162</sup> Ontario Courts of Justice Act, R.S.O. 1990, c. C.43

<sup>163</sup> Ministry of Attorney General, Ontario 2017 “Public information notice – Ontario mandatory mediation program” <https://www.attorneygeneral.jus.gov.on.ca/english/courts/manmed/notice.php> (accessed on 31 August 2017).

<sup>164</sup> De Jong 2014:32.

<sup>165</sup> McGill 2007:50.

<sup>166</sup> Québec City sits on the Saint Lawrence River in Canada's most French-speaking Québec province. The population as in 2014 was 538 238. *Québec*. <https://www.thecanadianencyclopedia.ca/en/article/quebec/> (accessed on 31 August 2017).

<sup>167</sup> McHale “Discussion paper on Uniform Mediation Act” 2000):4-5.

<sup>168</sup> Klause & Steffek 2013:929.

with the objective of reaching an amicable solution.<sup>169</sup> Should the parties not agree, to mediate the normal litigation process will follow.

In Canada the court-based mediation process commences with a request to mediate, filed by one of the parties. There are, however, legal penalties for the party who fails to take part in the mediation process should the court find that the case could have been resolved by way of mediation. This dissimilarity is significant in respect of the process in South Africa where it is also voluntary; however, there are no consequences for the party who fails to take part in the process.

Canada is a financially viable country and invests profoundly in its civil justice system.<sup>170</sup> It is further interesting to note that in Canada, attorneys are obligated to confirm that they have complied with their responsibilities to discuss the different dispute resolution options with their clients prior to starting proceedings in court. This rule encourages the informed use of out-of-court processes to resolve family law disputes.<sup>171</sup> These responsibilities are set out in section 9(2) and 9(3) of the Canadian Divorce Act.<sup>172</sup>

The Canadian government therefore recognised the importance of introducing ADR processes to promote more a cooperative and appropriate resolution of family disputes and the majority of all legislation allows private adjudication of these matters.<sup>173</sup> During the 1980s the Canadian Divorce Law encouraged parties to take part in mediation in order to settle family disputes amicably.<sup>174</sup> The majority of provinces in Canada allow parties to a family dispute to refer their matters to arbitration. Private adjudication boils down to the parties choosing an arbitrator and then agreeing to the terms of the arbitration agreement. They are then ultimately bound to accept the arbitrator's decision. The negotiation process would normally ascend from a pre-existing arrangement to go to arbitration, unless the parties agree to specific terms of an arbitration agreement which they entered into after the dispute

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<sup>169</sup> Légis Québec 2017. C-25.01 – Code of Civil Procedure <http://legisquebec.gouv.qc.ca/en/pdf/cs/C-25.01.pdf> (accessed on 12 January 2018).

<sup>170</sup> Joubert 2012 “Embedding mediation in South Africa” <https://www.mediate.com/articles/Joubertj1.cfm> (accessed on 03 September 2017).

<sup>171</sup> SALC 2015 “Family dispute resolution: Care of and contact with children”, Issue paper 31. [http://www.justice.gov.za/salrc/ipapers/ip08\\_prj94\\_1997.pdf](http://www.justice.gov.za/salrc/ipapers/ip08_prj94_1997.pdf) (accessed on 31 August 2017).

<sup>172</sup> Parliament of Canada. Divorce Act. R.S.C.1985.

<sup>173</sup> De Jong 2014:32.

<sup>174</sup> Klause & Steffek 2013:926.

has started.<sup>175</sup> As mediation is a voluntary process and the outcome thereof is in control of the parties, it is submitted that mediation is still the preferred process.

Considering the fact that the arbitrators play a decision-making role, it is important that family law arbitrators must meet specific training and practice standards. As from January 2014, all family law arbitrators in the western province of Canada, more specifically the British Columbia, had to meet the new minimum training and practice standards as was set out in the regulations of the Family Law Act 2011. The arbitrators had to be lawyers, psychologists or social workers by profession. They should further have at least ten years' experience in a similar field of family law, and undergo appropriate training in arbitration, family law, decision-making, skills development, and family violence.<sup>176</sup>

### 3.2.2 Indonesia

Indonesia is a diverse nation comprising more than 300 tribes. The national slogan of this country is "Unity in Diversity" (*Bhinneka Tunggal Ika*) and every tribe have their own way of resolving disputes amongst themselves.<sup>177</sup> Considering the diversity in this country, the legal system is based on three different legal sources, namely Islamic law, *adat* (customary) law, and state law. Evidently, this creates a multifaceted legal system where each exists freely; however, they influence each other to some extent.<sup>178</sup>

Despite the various differences, there is a unanimous decision when it comes to dispute resolution, and that is to resolve disputes harmoniously. Indonesians perceive conflict that starts within a family as an internal issue, and it should be settled within the family. It is preferred that a mediator assists in these situations, especially when domestic violence is involved. Mediation is therefore the first choice of dispute resolution as opposed to arbitration and litigation processes.<sup>179</sup>

Similar to South Africa and Canada, disputants were prejudiced by the unfair, time-consuming, and costly procedures. Cases took a very long time to be finalised and in some instances, took years to reach finality. Some of the reasons for this protracted

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<sup>175</sup> De Jong 2014:32.

<sup>176</sup> De Jong 2014:32.

<sup>177</sup> Syukur & Bagshaw 2013a:271.

<sup>178</sup> Syukur & Bagshaw 2013a:272.

<sup>179</sup> Syukur & Bagshaw 2013a:272.

process were the postponement of the cases for various reasons, whether it was a request by either party for extension of time to prepare, or the health condition of the judge. Unfortunately, some of the delays were attributed to the legal representatives attempting to deliberately prolong the proceedings.<sup>180</sup>

The Western model of court-annexed mediation were introduced to the Indonesian courts in 2003 and formed part of the legal reforms established in 1998 after the New Order regime. Mediation as method to resolve disputes was considered to be the most appropriate system to be united with the Indonesian judicial system.<sup>181</sup> The implementation of court-annexed mediation was an effort to regenerate the Indonesian civil procedural law, which compels judicial officers to emphasise the settling of disputes amicably. It further intended to address the problems of immense corruption in the judicial system and backlog cases in the courts.<sup>182</sup> Court-annexed mediation is a mandatory process to be undertaken by the parties before the litigation proceedings can commence. Lawyers are now obliged to explore this option to settle disputes. This is different to the current position in South Africa where the process is still voluntary. Similar to Canada, parties are indeed obligated to act in good faith during the mediation process.<sup>183</sup>

The objectives of court-annexed mediation are outlined in the 2008 Supreme Court Regulations and read as follows:<sup>184</sup>

- To be an effective instrument to overcome the case backlog in courts.
- To provide a fast, simple, and affordable process and give access to justice to poor and vulnerable parties, including women and children.
- To strengthen and maximise the function of judiciary institutions in dispute resolution beside the adjudicative litigation process.
- To support the state legal procedures to go to an amicable process, which can be intensified by integrating the mediation process into litigation procedures.
- To temporarily act as a legal basis to ensure legal certainty and order in the amicable process of all parties in settling civil disputes (while waiting for higher regulations to be issued).<sup>185</sup>

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<sup>180</sup> Syukur & Bagshaw 2013a:275.

<sup>181</sup> Syukur & Bagshaw 2013a:275.

<sup>182</sup> Syukur & Bagshaw 2013b:370.

<sup>183</sup> Syukur & Bagshaw 2013a:276.

<sup>184</sup> Syukur & Bagshaw 2013a:276.

Mediation further provides for confidentiality as it is only the parties to the dispute and the mediator who attend the meeting. Therefore, the parties are not as exposed as they would have been in an open court setting.<sup>186</sup> The confidentiality of the process supports the view of the Indonesians that family disputes are private.

The 2008 Supreme Court Regulations also regulate the code of conduct for mediators. Before a case is mediated, a case summary must be submitted to the mediator as well as the opposing party. The mediator's tasks are defined along with the possibility of including an expert's opinion.<sup>187</sup> Mediators can also declare that the mediation process has failed due to the absence of either party on two consecutive occasions or based on the opinion that there are other parties that should join the sessions. Although the normal period for a mediation process is 40 days, same can be extended with an extra 14 days in order to finalise, should it be deemed necessary by either the mediator or one of the parties.<sup>188</sup> Once a settlement is reached, legal enforcement can be obtained from the court on condition that the process was facilitated by a certified mediator.<sup>189</sup> The parties will return to court on a predetermined date where "the settlement agreement is then upheld in the form of a settlement deed (*Acta Van Dading*)".<sup>190</sup>

Non-compliance with the process described above, will result in the court ruling to be null and void.<sup>191</sup> The majority of the mediators are thus judicial officers who are directed by the civil procedure law to resolve disputes in an effort to settle disputes as amicably as possible. The regulations<sup>192</sup> for the court-annexed mediation proceedings make provision for judges who are not certified as mediators to fulfill this role in the absence of certified mediators at a local court.<sup>193</sup>

According to the statistics available, mediation in 2013 showed the following results:<sup>194</sup>

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<sup>185</sup> Syukur & Bagshaw 2013a:277.

<sup>186</sup> Syukur & Bagshaw 2013a:276.

<sup>187</sup> Syukur & Bagshaw 2013a:276.

<sup>188</sup> Syukur & Bagshaw 2013a:276.

<sup>189</sup> Syukur & Bagshaw 2013a:277.

<sup>190</sup> Firmansyah 2015:12.

<sup>191</sup> Syukur & Bagshaw 2013b:371.

<sup>192</sup> Court-annexed mediation is provided for in the Supreme Court Regulation No. 1 of 2008.

<sup>193</sup> Syukur & Bagshaw 2013b:371.

<sup>194</sup> Firmansyah 2015:16.

**TABLE 3.1: MEDIATION SUCCESS IN 2013**

No	Type of court	Incoming case	Successfully mediated	Percentage
1	District Court	5 573	1 194	21.4%
2	Religious Court	148 241	25 318	17.08%

As mentioned above, Indonesians believe that matters should be resolved in a harmonious way. The fact that parties are subjected to a mediation process does not necessarily mean that they are obligated to settle, although settlement is the objective. From the above statistics 21.4% and 17.08% of the cases were successful and the reasonable inference that can be drawn from this is that in these cases not only a settlement was reached, but relationships restored, saving on time and costs for both the parties and the taxpayer.

The researcher acknowledges that the idea of mediation would have been more appealing if the statistics in terms of successful cases were higher; however, no process is absolute and without flaws, considering that we deal with humans and their emotions when defending their stance, and in both instances the statistics indicate that as a result of the cases that were mediated, there was an immediate relieve to the court's workload as the successful cases did not have to be adjudicated.

However, despite what the regulations stated, the mediation process in Indonesia is not receiving the judicial support it is supposed to receive and is perceived as a disappointment rather than a solution. This view is further aggravated due to the lack of training of judicial officials.<sup>195</sup>

### **3.2.3 Lessons for South Africa**

The current position in South Africa supports the voluntary participation in mediation. There are, however, a few critics who is of the view that the voluntary process borders down to the normal litigation process, and can only be prevented unless there is support from the judiciary to convince parties to mediate their disputes.<sup>196</sup> From the statistics provided herein, whether it is in other jurisdictions or local, it can be seen that parties are willing to take part in mediation and that there are positive

<sup>195</sup> Syukur & Bagshaw 2013a:277.

<sup>196</sup> SALC Family Dispute Resolution: Issue paper 31 2015:226.

outcomes to the process. With the support of the judiciary, the number of cases mediated can increase drastically.

As mentioned in the discussion pertaining to mediation in Indonesia, the presiding officers are required to apply ADR methods to resolve disputes as amicably as possible.<sup>197</sup> This approach will therefore assist and promote the participation in the mediation process.

In support to the above statement, consideration should be given to the fact that there are some judicial officers who may lack the expertise required to do justice to a specific dispute. This may be due to the random allocation of cases to magistrates and judges as it is accepted that all presiding officers are duly equipped to adjudicate any type of dispute presented before them. However, there is a vast difference in theory and how it works in practice. Thus, a judicial officer who acknowledges his or her shortcomings in respect of experience will more likely be in favour of the notion to refer matters for mediation where the mediator is a specialist on the subject matter.<sup>198</sup> It can be argued that the success of mediation is not only reliant on the parties, but also seeks the continues support of the judiciary. Marnevic can be commended for suggesting that courts give preference to cases where parties are mediated, then effectively would have two court roles: one with mediated cases and one with cases where no mediation was done. The second court role will quickly get shorter as parties will start to acknowledge the fact that their cases will be finalised quicker if they follow the rout of mediation first.<sup>199</sup>

Currently, South Africa does not have specific accredited training for mediators, except for the requirements as mentioned in the court rules. There are further no specific training sessions for presiding officers. At this stage there is extensive debates locally and internationally on the issue of accreditation standards for mediators. The accreditation will ultimately involve the formal recognition of the mediators, the organisations, as well as specified objective standards which relate to the experiences, capability, principles and performance of the mediator.<sup>200</sup>

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<sup>197</sup> See 3.3.2.

<sup>198</sup> Marnewick 2015:24.

<sup>199</sup> Marnewick 2015:27.

<sup>200</sup> DiSAC "Mediation accreditation standards" 2011:3.

In order to address this issue of training, it is necessary to refer to the Dispute Settlement Accreditation Council (DiSAC) which is a voluntary industry body whose objectives are to provide a uniform system for dispute resolution practitioner accreditation. DiSAC was officially launched during March 2010 and provides an industry supported certification of qualification and good standing. This accreditation is voluntary as there is no obligation that rests on the mediators to be accredited themselves; however, it provides some peace of mind to the public that a mediator accredited by DiSAC meets the minimum industry standards for practice.<sup>201</sup>

Considering the void in respect of training and the fact that the mediation profession is not otherwise regulated by legislation, it will be in the best interest of South Africa to follow in the footsteps of Canada where formal training and experience is regarded as an essential requirement for any mediator or legal professional. Furthermore, the success rate of mediation, as indicated by Marnevic, can be improved if the settlement process is concluded by a trained mediator.<sup>202</sup>

### **3.3 South Africa**

In South Africa, the mediation process is moulded and defined by the law which includes the Constitution, statutes and judicial decisions. Certain legislations refer specifically to compulsory, as well as voluntary, mediation. The Constitution itself is a good example as section 76 deals with the national legislative processes.<sup>203</sup> A legislative bill goes through various platforms to seek inputs and approval before it is finally passed. The first step of the process is to refer the bill to the National Assembly and thereafter to the National Council of Provinces. If the two are not in agreement for whatever reason, the bill in question will be referred to the Mediation Committee for consideration and discussion in order to find an amicable compromise suitable to all concerned.<sup>204</sup>

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<sup>201</sup> DiSAC “Comments on the ‘court-annexed mediation rules of the Magistrates’ courts’”. <http://disac.co.za/wp-content/uploads/2014/12/DiSAC-Comment-on-Court-Annexed-Mediation-May-20131.pdf> (accessed on 13 January 2018).

<sup>202</sup> Marnevic 2015:22.

<sup>203</sup> Maclons 2014:73.

<sup>204</sup> Constitution, 1996 Sec 76(1)(d).

The Commission on Gender Equality Act<sup>205</sup> determines that when the Commission investigates a gender-related complaint, they must attempt to resolve the dispute or remedy any omission through a process of mediation.<sup>206</sup>

Section 42 of the Health Professions Act provides that less serious transgressions should be referred for mediation to the professional boards which are established in terms of the Act.<sup>207</sup>

Section 8 of the Higher Education Act<sup>208</sup> states that, in each institution an institutional forum must advise the council on issues such as mediation and dispute resolution processes.<sup>209</sup>

In all of the above examples, mediation is set as a compulsory ADR process to be followed. There are, however, also statutes where mediation is still a voluntary process to be considered.

The Child Justice Act<sup>210</sup> provides for an informal procedure called 'victim-offender mediation'. This mediation procedure is intended to bring a child, who is alleged to have committed an offence, and the victim together, at which point a plan is developed on how the child will redress the effects of the offence. Neither of the above legislations provide definite guidance on the process to follow in order to comply with the mediation.

In the case of *Port Elizabeth Municipality v Various Occupiers*<sup>211</sup> the Constitutional court said:

The managerial role of the courts may need to find expression in innovative ways. Thus, one potentially dignified and effective mode of achieving sustainable reconciliations of the different interests involved is to encourage and require the parties to engage with each other in a proactive and honest endeavour to find mutually acceptable solutions. Wherever possible, respectful face-to-face engagement or mediation through a third party should replace arms-length combat by intransigent opponents.

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<sup>205</sup> Act 39 of 1996 Se 11(1)(e).

<sup>206</sup> Esplugues & Marquis 2015:671.

<sup>207</sup> Act 56 of 1974.

<sup>208</sup> Act 101 of 1997.

<sup>209</sup> Esplugues & Marquis 2015:673

<sup>210</sup> Act 75 of 2008 Sec 62.

<sup>211</sup> 2005 (1) SA 217 (CC) at (39),

During November 2009 a practice directive was issued by a magistrate of a lower court in Bellville in the Western Cape, acquainting others of the ground-breaking decision taken by the high court in the MB v NB case.<sup>212</sup> It further indicated that cases would only be set down for trial after parties submitted a certificate of attendance of a mediation process followed.<sup>213</sup> Although this was a step in the right direction, it should be mentioned that practice directives are only applicable to the court where it was issued and no provision was made in the Magistrates Court Act which determines that a practice directive of a specific magistrates' court, as in this instance, should be complied with by all other magistrate's courts.

During September 2010, the Labour Appeal Court also followed suit in that the Judge President revised the practice directive regulating the conduct of proceedings in the Labour Courts. The objective of this practise note was to better the case management by judicial officers, to advance the effectiveness with which cases are being referred to the said courts and promote access to justice. As a result, new ingenuities, which included court directed meditation, became applicable.<sup>214</sup>

In terms of the current position in terms of the High Court Rule 37 (6), it is required that mediation should only be considered by the parties. Subsequent to the ruling in the MB v NB<sup>215</sup> case, a radical transformation came about in relation to dispute resolution in South Africa. In the mentioned case, Brassey AJ held that the participation in mediation where parties are considering divorce proceedings is strongly supported:<sup>216</sup>

Mediation can produce remarkable results in the most unpropitious of circumstances, especially when conducted by one of the several hundred people in this country who have been trained in the process. The success of the process lies in its very nature. Unlike settlement negotiations between legal advisers, in themselves frequently fruitful, the process is conducted by an independent expert who can, under conditions of the strictest confidentiality, isolate underlying interests, use the information to identify common ground and, by drawing on his or her own legal and other knowledge, sensitively encourage an evaluation of the prospects of success in

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<sup>212</sup> The Bellville court was contacted on 24 January 2018 to establish what the exact content of the practice directive was and on which cases the said directive was applicable. Upon consultation with one of the magistrates, Mr MMB Godwana, it was confirmed that the Bellville court to date have not dealt with many mediation cases; hence he could not confirm with certainty if the directive was applicable only to certain cases dealt with by that court. Mr Godwana confirmed this information with the senior magistrate of that court, Mr Van Reenen.

<sup>213</sup> Brand *et al* 2012:9.

<sup>214</sup> Brand *et al* 2012:9.

<sup>215</sup> MB v NB 2010 (3) SA 220 (GSJ).

<sup>216</sup> Schultz 2011:1.

the litigation and an appreciation of the costs and practical consequences of continued litigation, particularly if the case is a loser.<sup>217</sup>

In the matter of *S v J* It has been stated that legal representatives should pay more attention to Section 6(4) of the Children's Act which provides that a process which is less confrontational and leans on conciliation and problem-solving should be followed and less on adversarial methods of dealing with family-related legal issues as opposed to submitting the matter directly to court as the first point of entry.<sup>218</sup>

### 3.3.1 Court-annexed mediation

Following the Access to Justice Conference in July 2011, the South African legislator embarked on a new project where ADR mechanisms, such as court-annexed mediation, were to be introduced in the court system to achieve accessibility and quality justice for all. This was concluded in the promulgation of the Amendment of rules regulating the conduct of the proceedings of the Magistrates' Courts in South Africa.<sup>219</sup>

By formally introducing mediation to the court environment in August 2014, the South African government had set the stage for court-annexed mediation to commence. The only further requirement was the will of the parties involved to participate in this process.<sup>220</sup>

In order to assist with the implementation of the Mediation Rules, the minister appointed an advisory committee who provided advice in relation to the norms and standards for mediators, as well as the accreditation of the mediators for enlistment to the panel, as required by the Mediation Rules.<sup>221</sup>

In addition to the development of the desired norms and standards, the Advisory Committee were also responsible for the following functions which were necessary to ensure the successful implementation of the mediation rules:

- Liaise with universities and training institutes, including Justice College and the South African Judicial Education Institute for purposes of designing

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<sup>217</sup> Brassey AJ in *MB v NB* 2010 (3) SA 220 (GSJ) at para [1].

<sup>218</sup> *S v J* [2011] 2 All SA 299 (SCA) at para [54] (*S v J* is also cited as *FS v JJ* 2011 (3) SA 126 (SCA)).

<sup>219</sup> RSA DoJ&CD "Amendment of rules regulating the conduct of the proceedings of the Magistrates' courts of South Africa" [http://www.justice.gov.za/legislation/notices/2014/2014-03-18-gg37448\\_rg10151\\_gon183-rules-mc.pdf](http://www.justice.gov.za/legislation/notices/2014/2014-03-18-gg37448_rg10151_gon183-rules-mc.pdf) (accessed on 14 March 2017).

<sup>220</sup> Van den Berg 2015:24.

<sup>221</sup> RSA DoJ&CD n.d. "Court-annexed mediation. Question and answers" <http://www.justice.gov.za/mediation/mediation.html> (accessed on 02/11/2017).

appropriate training programmes for mediators, mediation clerks and other users of the system.

- Assist the department in investigating the desirability of legislation on compulsory mediation.
- Advise on any aspect pertaining to the implementation of the Mediation Rules and ADR in the broader sense.<sup>222</sup>

The Advisory Committee further consulted with Institutions of Higher Education and social partners, among other stakeholders, in exercising its mandate in accordance with the above terms of reference. The list of accredited mediations to assist in the Magistrates Courts identified to serve as pilot sites in Gauteng and the North West Provinces, were published in the Government Gazette<sup>223</sup>.

Rule 76(1)<sup>224</sup> stipulates the functions of the clerk who is responsible to inform the parties of the purpose of ADR, the meaning and objectives thereof, as well as the benefits such as saving of costs.<sup>225</sup> The tariffs of fees chargeable by the mediator are regulated and the cost must be borne equally between the parties, unless otherwise agreed.<sup>226</sup>

The clerk or registrar is further responsible to inform the parties that they can be assisted by a practitioner of their choice and will be responsible for the payment of fees. A written agreement will then be completed and signed by both parties should they want to take part in the mediation process.<sup>227</sup> The normal timeframes applicable during the litigation process is considered suspended from the time the parties concluded the agreement to mediate, until the conclusion of the process.<sup>228</sup>

South Africa can now be regarded to follow in the footsteps of other countries where ADR mechanisms are introduced and applied to cases.<sup>229</sup>

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<sup>222</sup> RSA DoJ&CD n.d. "Court-annexed mediation. Question and answers" <http://www.justice.gov.za/mediation/mediation.html> (accessed on 02/11/2017).

<sup>223</sup> Rules board for Court of Law Act GN 854 of 31 October 2014 (Government Gazette 38163).

<sup>224</sup> Magistrates' Court Rules 2010.

<sup>225</sup> Magistrates' Court Rules 2010.

<sup>226</sup> Magistrates' Court Rules 2010 Rule 84.

<sup>227</sup> Magistrates' Court Rules 2010 Rule 76(2).

<sup>228</sup> Magistrates' Court Rules 2010 Rule 81.

<sup>229</sup> Marnewick 2015:4.

### **3.3.2 Referring disputes for mediation prior to commencement of the litigation process**

Rule 77<sup>230</sup> deals with the referral of disputes for mediation prior to the commencement of the litigation process. A party who desires that a dispute be referred for mediation, should submit a written request to the clerk or registrar of the applicable court. This request should provide the full details of the parties, details of the dispute, and more importantly, refer to the relief sought through the mediation process. The clerk of the court will then inform the relevant parties to the dispute that there is a request to mediate the matter and will call upon the parties to meet within 10 days to establish if both parties agree to the process.<sup>231</sup>

Once the parties agree to the process, a mediator will be appointed, and arrangements will be made for the session to take place. In addition to the statement providing confirmation or agreement to mediation, details pertaining to the mediator, and in particular the mediation session, are to be provided to the clerk of the court.

The party requesting the mediation must, within 10 days after the agreement to mediate was signed, lodge a statement of claim with the clerk of the court, which is also to be served on all parties to the dispute. In return, the party against whom the application to mediate is brought, should within 10 days after the statement of claim was received, submit a statement of defence to the clerk of the court as well as to any other party to the dispute.<sup>232</sup>

### **3.3.3 Referral of a dispute to mediation once litigation has commenced**

In terms of Rule 78<sup>233</sup> any party may request the clerk of the court to refer the dispute for mediation, even after the litigation process commenced. It is only after the trial has started, but before judgement is granted, that a party must make an application to the court in order to have the matter referred for mediation.<sup>234</sup> The matter will then be referred to the clerk or registrar to facilitate the mediation proceedings.

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<sup>230</sup> Magistrates' Court Rules 2010.

<sup>231</sup> Magistrates' Court Rules 2010 Rule 77(4).

<sup>232</sup> Magistrates' Court Rules 2010 Rule 77(5-6).

<sup>233</sup> Magistrates' Court Rules 2010

<sup>234</sup> Magistrates' Court Rules 2010 Rule 78(1-2).

The mediator will then assist the parties to mediate the dispute and ultimately reach a solution that is acceptable to both parties. It is thus vital to appoint a mediator with experience in mediation when dealing with matters where one of the objectives will be to restore or maintain the current relationship between the disputants. Some examples of these relationships are:

- Matrimonial or similar relationships.
- Employment relationships.
- Neighbours.
- Landlord and tenant relationships.<sup>235</sup>

Where parties are not able to negotiate on their own, the presence of a mediator is of the utmost importance to ensure that no opportunities are missed. By virtue of their experience and/or knowledge the mediator will assist the parties to communicate in a more effective manner by:

- asking relevant questions;
- clarifying statements and concerns;
- eliciting more information which might assist to shed more light on a fact;
- dealing with emotions;
- identifying the issues that parties fail to mention; and
- highlighting issues of common cause and issues in dispute, narrowing down the matters to be discussed.<sup>236</sup>

The Constitutional Court held in the case of *Nkata v FirstRand Bank Ltd*<sup>237</sup> that the National Credit Act<sup>238</sup> was a paradigm shift from the past, and promoted dialogue between consumers and credit providers, leaving room for mediation in agreements and/or contracts of this nature.

Recently there have been more cases whereby courts acknowledged the process and the benefit of mediation as set out in *MB v NB*<sup>239</sup>. In the matter of *Makate v Vodacom Ltd*<sup>240</sup> and *Ever Fresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty)*

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<sup>235</sup> Marnewick 2015:15.

<sup>236</sup> Marnewick 2015:16.

<sup>237</sup> 2016 (4) SA 257 (CC).

<sup>238</sup> Act 34 of 2005.

<sup>239</sup> 2010 (3) SA 220 (GSJ).

<sup>240</sup> 2016 (4) SA 12 (CC).

Ltd<sup>241</sup>, the court made mention of the duty that rests upon parties to negotiate in good faith when they are contractually bound to do so.<sup>242</sup> This should follow suit when mediating, which is a form of inquisitive negotiation, specifically when there is a breach of contract between the parties.

In South Africa there is no definite procedure in the Mediation Rules for the Magistrates Court to ensure the productive engagement by a party invited to mediation. There is further no consequence in instances where there is blatant failure or refusal by one party in relation to the invitation to mediate the dispute.<sup>243</sup> On the other hand, the process is conducted in an informal manner, although regulated by the rules which give it a sense of formality, transparency and uniformity. In this way the process is more manageable for all the parties involved.<sup>244</sup>

Furthermore, the rules for voluntary mediation aim to promote access to justice restorative justice, and the restoration of relationships which may possibly be strained between litigants due to the adversarial nature of litigation. It further facilitates a quick and cost-effective way of resolving disputes between parties, by assisting the parties in determining at an early stage of the litigation what process will be in their best interests. These rules further provide that the parties to the mediation are responsible for payment of the fees of the mediator, unless the services of a mediator are provided for free.<sup>245</sup>

Marnewick identified numerous shortcomings in relation to the approved mediation rules guiding the process. His first concern was based on the fact that nowhere in the rules mention is made of the term 'negotiation' which is the crux of mediation and what it is about. According to Marnewick it would appear as if the rules were drafted with the roles and responsibilities of both the clerk and the mediator in mind but neglecting the responsibilities? in respect of the parties to the dispute. Secondly, the rules determine that the process will be controlled by the mediator. This takes the process back to how a normal litigation process is dealt with where the judicial officer is in charge of the process. The example referred to was cases dealt with in the

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<sup>241</sup> 2012 (1) SA 256 (CC).

<sup>242</sup> Berg 2017 "Real estate mediation – Stop the costs before they get to court, De Rebus, April 2017. <http://www.derebus.org.za/real-estate-mediation-stop-costs-get-court/> (accessed on 13 January 2018).

<sup>243</sup> Joubert 2014 "Mediation rules require judicial activism to get the system going" <http://www.jacques-joubert.co.za/articles> (accessed on 31 August 2017).

<sup>244</sup> Marnewick 2015:7.

<sup>245</sup> Maclons 2014:138.

small claims court where the hearing serves as the mediation phase which is then controlled by the commissioner of that court and ultimately makes the process inquisitorial in nature. According to Marnewick, this modern approach of the mediation process is incorrect as the parties should be allowed to freely decide on the process to be followed.<sup>246</sup>

The third concern raised was that there is no indication of what duties rest upon the parties in the rules, nor in the forms attached to the rules. The parties therefore have no idea how to prepare for the mediation in terms of the documents to be submitted, such as statements, witnesses and legal advice.<sup>247</sup> The lack of preparation poses a further challenge to the parties as they will only find out on the day of the actual mediation that they will be negotiating directly with the other party and not via the mediator who may not actively take part in the process. The researcher agrees with Marnewick that clear descriptions and information should be provided to the parties prior to the commencement of the mediation session.<sup>248</sup> This aspect may also influence Rule 72 of the approved mediation rules which states that mediation is a voluntary process and will only commence once both parties agree to mediate.<sup>249</sup> The question can be asked: How will the parties take an informed decision to mediate or not if they do not know what is expected from them during the process? The idea of mediation is to help the parties control the process and the outcome; however, they are not allowed to decide which mediator they want to use. There is a limitation in terms of Rule 73 that only mediators listed in the schedule published by the Minister may be used to assist in this process.<sup>250</sup>

Another interesting question raised by Marnewick was whether matters where the litigation process already started in the High Court, could still be referred to mediation in terms of the Magistrates Mediation Rules. Rules 78 and 79, respectively, assist to answer this question as they refer to the powers of the court, where the court is defined as the magistrates' court in terms of the Magistrates' Court Rules. There is thus a limitation in this regard to refer matters for mediation when they have been instituted in the High Court. There is, however, no clear limitation in instances where the litigation process has not yet started. In this

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<sup>246</sup> Marnewick 2015:88.

<sup>247</sup> Marnewick 2015:88. Reference is made to Rule 87 of the approved mediation rules.

<sup>248</sup> Marnewick 2015:107.

<sup>249</sup> Marnewick 2015:90.

<sup>250</sup> Marnewick 2015:90.

instance, the nature of the claim, for example the monetary value, bears no influence in the referral of the matter for mediation, which creates discomfort in respect of which court actually has jurisdiction should the agreement be made an order of court, or should the mediation be unsuccessful.<sup>251</sup>

### **3.3.4 Data of cases for the period 2014–2017**

As already mentioned, the purpose of the mediation process was to make justice more accessible for the public in the civil and family courts. This initiative ultimately forms part of a larger Civil Justice Reform Project. A training manual was developed for the Department of Justice.<sup>252</sup> The manual assisted to ensure that the implementation of court-annexed mediation is the same at each of the pilot sites, guiding the clerks appointed on their internal duties and functions.

The Court-Annexed Mediation pilot project which commenced in February 2015 was assessed by the DoJ&CD. A critical assessment based on the discussions held with stakeholders and to determine a cost analysis required for the said department's intention to roll out mediation to all courts in Gauteng and the North West Provinces, were included in the report.

The report further established amongst issues such as whether the mediation process was successful, and the value added to the process of resolving disputes.

Although the mentioned report has not yet been approved by the delegated authority, statistics obtained from the DoJ&CD proves mediation to be beneficial.

Table 3.2 indicates the total number of cases captured at various pilot sites for the period January 2015 to August 2017.<sup>253</sup> The nature of the cases referred to includes contract disputes, evictions, maintenance and domestic violence.

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<sup>251</sup> Marnewick 2015:91.

<sup>252</sup> Available from the author.

<sup>253</sup> Information obtained from the DoJ&CD on 05 September 2016.

**TABLE 3.2: NUMBER OF CASES CAPTURED AT PILOT SITES**

Court name	Total number of cases captured
Krugersdorp	204
Randburg	100
Soshanguve	50
Soweto	230
Palm Ridge	369
Kagiso	460
Sebokeng	124
Pretoria North	5
Johannesburg	79
Johannesburg Family Court	245
Potchefstroom	27
Mmabatho	0
Moretele	297

Table 3.3 shows there were 1 168 matters where the parties agreed to mediate, of which 631 cases were resolved by the mediation clerk. Therefore, no legal fees were payable in these matters by the parties. Only 136 cases were not successful during the process. In terms of cases dealt with on a *pro bono* basis, it can be seen as a further motivation that mediation can positively contribute to the aim of access to justice, as there are mediators who are willing to provide their services to the parties free of charge.<sup>254</sup>

**TABLE 3.3: STATUS OF CASES**

Resolved by mediation clerk		631
Settlement concluded		546
Invitation not accepted by respondent		435
Mediation concluded – no settlement		136
Agree to mediate	Yes	1 168
	No	576
Pro-bono	Yes	561
	No	354

The researcher believes that the court-annexed mediation project was a major project for South Africa as it had great potential to address the challenges faced in terms of access to justice. In order to conclusively say that the project was

<sup>254</sup> Information received from the DoJ&CD on 12/10/2017.

successfully implemented and that there was indeed a positive outcome, data had to be collected from all the pilot sites and diligently consolidated.

As stated earlier, the information received from the DOJ&CD was not yet approved by the Minister; however, the following discrepancies were already identified which questions the accuracy of the report:

- Cases resolved by the mediation clerks: It was in the first instance not clear what the role of the clerk was in this process as the rules indicated that the clerks only have an administrative role to play and not to mediate.
- When adding the numbers in terms of the cases received and cases mediated, it does not add up. It is not clear if there was a certain method used to calculate these numbers. No indication is given as to the reason why some cases were not successfully mediated.

These discrepancies, however, do not make the report ineffective and reasonable analysis and/or conclusions from the data can still be regarded relevant as explained above.

### **3.4 Conclusion**

It is evident from the comparative study that there are some valuable lessons to be learnt from the way mediation is approached in the jurisdictions discussed. A case can be made out for the use of compulsory court-annexed mediation on the basis that it is properly regulated with consequences for non-compliance.

The discussion regarding the court-annexed mediation initiative and the interim statistics in South Africa led to the conclusion that, although not ideal, there is potential for further and greater success. It is suggested that, in order to reach its full potential, some amendments to the rules will be required. The duties and responsibilities of the parties in particular need to be better defined and expanded upon. Lastly, it was submitted that the mediation profession, in general, and the qualification and accreditation standards need to be regulated and standardised by a central body with the power to hold mediators accountable for misconduct.

## **4.1 Introduction**

This chapter will investigate the benefits of mediation using a specific court case as example, as well as the feasibility of following a mandatory approach for court-annexed mediation and the aspects of access to justice. It further looks at the impact that compulsory mediation may have in this regard.

## **4.2 Case study of the mediation process**

The benefits of mediation were clearly recognised by the South Gauteng High Court in the case of MB v NB<sup>255</sup>.

When considering the findings in the above-mentioned case, there is a clear negative tone in the judgement of Judge Brassey, with specific reference to the process followed to resolve the matter at hand. Emphasis was placed not so much on the time it took to resolve the issues in dispute, but more on the extraordinary amount spent on legal costs in terms of litigation incurred by both the parties. The Court pointed out that the combined costs of the matter was in the region of R500 000,00 to R750 000,00 and that this money could have been put to better use by the parties.<sup>256</sup>

It was further mentioned that the legal representatives should have considered mediation during the pre-trial conference but acted in the negative thereof. Although the trial judge endeavoured to submit the matter to the process of mediation, he was requested to recuse himself, which application he granted in order to avoid the matter not being resolved timeously and amicably.

The judge went on to say that mediation can produce significant results in most situations, particularly when conducted by one of numerous people in South Africa who had been properly trained in the process.

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<sup>255</sup> MB v NB 2010 (3) SA 220 (GSJ) para 50.

<sup>256</sup> Tracey-Leigh Wessels & Associates "Features of mediation" <http://www.traceyleighwessels.com/mb-v-nb-judgement> (accessed on 16 October 2017).

The mediation process is conducted by an independent third party who can separate the fundamental interests of both parties and use the information available to identify common ground by applying his or her experience. At the same time, confidentiality is observed while an evaluation is done on the prospects of success in terms of litigation and the consequences thereof, but also the possible costs implication for the parties.<sup>257</sup>

Judge Brassey further pointed out that if mediation is appropriate in commercial law matters, it is even more so in family law matters. In this case the court referred to the fact that during the litigation process in family disputes, emotions may run high.<sup>258</sup>

The judge concluded that there are numerous advantages attached to the process of mediation. He stated that considering the fact that the parties had ample time to subject the issues to a mediation process, there was a strong possibility that they would have been successful in this process. Finally, the judge noted his displeasure towards the legal representatives handling the matter and ordered that the legal fees be limited to the scale of party and party costs.<sup>259</sup>

Schultz<sup>260</sup> submitted that by limiting the legal fees, the court aimed to caution attorneys to be reminded of their responsibility to advise clients on the possibility of using mediation in family matters in appropriate circumstances, and not just focus on raising more fees.

As mentioned above, the mediation process holds numerous advantages as set out below:

□ **Quick**

The mediation process normally takes days or weeks to be finalised, while the normal litigation processes usually take months or years to be finalised.<sup>261</sup> Mediation makes it easier for parties to get on with their lives as disputes are resolved in a shorter space of time.

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<sup>257</sup> Tracey-Leigh Wessels & Associates "Features of mediation" <http://www.traceyleighwessels.com/mb-v-nb-judgement> (accessed on 16 October 2017).

<sup>258</sup> MB v NB 2010 (3) SA 220 (GSJ) para 52.

<sup>259</sup> Tracey-Leigh Wessels & Associates "Features of mediation" <http://www.traceyleighwessels.com/mb-v-nb-judgement> (accessed on 16 October 2017).

<sup>260</sup> Schultz 2011:47.

<sup>261</sup> Schultz 2011:18.

□ **Informal**

The mediator is in some way in control of the process in that certain strategic planning will be done before the process commences. This is to determine what the best way will be to deal with the matter, which includes whether joint sessions or individual meetings with each party will be necessary.<sup>262</sup> The informal setting of mediation allows the parties to be more engaged in the process than what they would be in a normal court-driven process where there are rules and procedures in place specifically designed to separate the parties. This is distinguishable from the normal litigation process where the attorneys and judicial officers take control over the process and as such the outcome depends on a range of factors, including how the case is presented.<sup>263</sup>

□ **Versatile**

Unlike normal court cases, the parties are in control during the mediation process. This means that the parties are more autonomous in negotiations and the eventual outcome of the process. As a result, mediation assists in restoring relationships, official and personal, which could have likely been destroyed through a prolonged litigation process. This is because of the collaborative, rather than adversarial, nature of the mediation process. The parties will therefore not be bound to any decision unless both have reached a point of consensus.<sup>264</sup> As part of the flexible nature of the mediation process, mediation is also a voluntary process at this stage where parties decide whether they want to take part in such a process. In this instance, parties are normally more driven to reach an agreement as they are in control of the process and the possible outcome. Depending on the circumstance, there might be provisions in a contract between parties that require that a mediation process must commence. The fact that there is an obligation on the parties to mediate, it may have an impact on the outcome, as it is no longer what the parties want to do in order to settle, but rather what they are obligated to do. An agreement might therefore not be reached at all.

□ **Cost-saving as an extra advantage**

Mediation is vastly less expensive in comparison to a typical litigation process. Appointing a mediator will cost significantly less than appointing a lawyer.

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<sup>262</sup> Brand *et al* 2012:26.

<sup>263</sup> Brand *et al* 2012:26.

<sup>264</sup> Brand *et al* 2012:26.

Considering the shorter turnaround time, the parties will be paying less money over a shorter period of time.<sup>265</sup>

### **4.3 The feasibility of mandatory mediation**

Mediation has legitimately positioned itself as a way to resolve disputes in terms of civil litigation. What is even more significant is the fact that this process is supported by the government.<sup>266</sup>

The study also focused on the cost implications which can be divided into two individual enquiries, namely the cost of implementing such a system in South Africa's civil justice system, and who would bear the cost of participating in the actual mediation process.<sup>267</sup>

The costs of effecting mandatory court-based mediation in the South Africa's civil jurisprudence should be covered by the DoJ&CD. This is evident after the Minister's speech at the Access to Justice Conference in 2011 during which he stated that it was incomprehensible as to why South Africa had taken so long to move to the adjustment of its civil justice system, through the implementation of a system such as mandatory court-based mediation.<sup>268</sup> The Minister further indicated that the DoJ&CD had provided additional capacity in line with the financial budget and human resources to support the implementation of court-annexed mediation at the pilot sites.

When focussing on the parties themselves, it was obvious that the sooner a dispute is resolved, the lesser the legal cost will be. Even if the mediation in itself was not completely successful, there might still be an element of cost-saving involved as the parties may have agreed on the facts in dispute and those which are common cause. Legal representatives should therefore advise their clients of the benefits of mediation and the risks in terms of legal costs should they not agree to participate in the process.

One should also not neglect to recognise the impact that this process will have on the government, and more bluntly the taxpayer. It will also have a greatly positive

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<sup>265</sup> FindLaw "The advantages of mediation cases over traditional lawsuits" <http://adr.findlaw.com/mediation/the-advantages-of-mediation-cases-over-traditional-lawsuits.html> (accessed on 20 August 2017).

<sup>266</sup> Marnevic 2015:7.

<sup>267</sup> Maclons 2014:140.

<sup>268</sup> Radebe 2011.

impact in relation to cost where cases are speedily finalised and removed from the role, which will ultimately save money for the Department and the taxpayer.<sup>269</sup>

#### 4.4 Constitutional position

The Bill of Rights as contained in Chapter 2 of the Constitution of South Africa, is ‘the cornerstone of the South African democracy “as it protects the rights of the people and upholds the democratic values of human dignity, equality and freedom”. The Constitution further sets out that the state’s duty is to “respect, protect, promote and fulfil the rights in the Bill of Rights”.<sup>270</sup> The controlled, yet flexible and informal environment created by the mediation process, encourages parties to have the autonomy to discuss their views and resolve their matter amicably.

Obligatory court-annexed mediation requires that when a party submits an appearance to defend in civil proceedings, the matter will be referred for mediation in an attempt to settle the dispute. Should the parties then not be able to settle the dispute, the matter automatically reverts to the normal process of litigation in order to be adjudicated in court. In the event that the matter is partly settled, the remaining issues which are then still in dispute, will be referred to court to resolve in accordance with the normal litigation procedure.

Section 34 of the Constitution<sup>271</sup> deals with the aspect of ‘Access to Courts’, and states as follows:

Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

In view of stipulation in the Conclusion, some concerns were raised, claiming that compulsory court-annexed mediation would infringe the constitutional right of access to courts.<sup>272</sup>

Mediation does not prevent any party from still going to court, as the process, whether it is voluntary or mandatory, is based on resolution by agreement. If no

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<sup>269</sup> Marnevic 2015:22.

<sup>270</sup> Act 108 of 1996 Sec 7(1)-(2).

<sup>271</sup> Act 108 of 1996.

<sup>272</sup> Adriaans Attorneys “Court-annexed mediation and section 34 of Constitution” <http://adriaansattorneys.com/2017/05/24/court-annexed-mediation-and-section-34-of-constitution/> (accessed on 19 October 2017).

agreement is reached between the parties, they may still approach a relevant court with jurisdiction to decide over the matter.

It is further interesting to mention that there are areas in the law where the process of mediation is indeed a compulsory requirement. Some legal practitioners often see this process as a mere formality; however, Rule 37(6) of the High Court and Rule 25 of the Magistrates' Court require that the minutes of the pre-trial hearing need to reflect that the possibility to settle was explored and parties responded accordingly.<sup>273</sup> In terms of the above-mentioned rules, disputants are compelled to attempt to settle their matters first; however, they are not compelled to settle.

The researcher is in agreement with Brand and Todd<sup>274</sup> that the only challenge that might bring some confusion within the current legal framework is how mediation as a compulsory process has a voluntary outcome. The issue of constitutionality can be based on two separate, but also interrelated components of section 34 of the Constitution,<sup>275</sup> namely mediation as the first step before court and mediation as a step during the court procedure.<sup>276</sup>

Therefore, there may possibly be a perception that should a person be subjected to mandatory mediation, that there might be a limitation to the right to have their matters adjudicated by a court. One of the areas in law where mediation is indeed compulsory is in the labour law where parties are compelled to mediate before a party can initiate further proceedings.<sup>277</sup> This process is called conciliation and commences before the actual arbitration process.

In *Giddey NO v JC Barnard and Partners*<sup>278</sup> the court held that:

Section 34 of the Constitution provides that everyone has the right to have a dispute that can be resolved by the application of law decided by a court or tribunal in a fair public hearing. This important right finds its normative base in the rule of law.

As Mokgoro stated in *Chief Lesapo v North West Agricultural Bank and Another*:<sup>279</sup>

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<sup>273</sup> See page 16 above.

<sup>274</sup> *Tokiso Dispute Settlement* 2015:49. ○

<sup>275</sup> Act 108 of 1996.

<sup>276</sup> *Tokiso Dispute Settlement* 2015:49.

<sup>277</sup> *Tokiso Dispute Settlement* 2015:49.

<sup>278</sup> (CCT65/05) [2006] ZACC 13; 2007 (5) SA 525 (CC); 2007 (2) BCLR 125 (CC) (1 September 2006).

<sup>279</sup> *Lesapo v North West Agricultural Bank and Another* (CCT23/99) [1999] ZACC 16; 2000 (1) SA 409; 1999 (12) BCLR 1420 (16 November 1999).

The right of access to court is indeed foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes, without resorting to self-help. The right of access to court is a bulwark against vigilantism, and the chaos and anarchy which it causes. Construed in this context of the rule of law and the principle against self-help in particular, access to court is indeed of cardinal importance...

But for courts to function fairly, they must have rules that regulate their proceedings. Those rules will often require parties to take certain steps on pain of being prevented from proceeding with a claim or defence...

Of course, all these rules must be compliant with the Constitution. To the extent that they do constitute a limitation on a right of access to court, that limitation must be justifiable in terms of section 36 of the Constitution. If the limitation caused by the rule is justifiable, then as long as the rules are properly applied, there can be no cause for constitutional complaint.

The perception that when a party is subjected to compulsory mediation he or she will waive his or her right in terms of section 34, as stated above, is therefore incorrect. The Constitution makes provision for the reasonable limitation of rights as determined in section 36. Compulsory mediation temporarily limits the right provided for in section 34 but is beneficial to the parties at the same time in terms of cost and time. Should the mediation process not be successful, the matter can still be adjudicated by a formal court and therefore the limitation is not absolute.

When establishing whether the right to fair justice of either party was infringed upon the participation of the mediation process, reference should be made to the approach adopted by the Constitutional Court in the case of *Lufuno Mphaphuli & Associates (Pty) Ltd v Nigel Athol Andrews and Others*<sup>280</sup> stating that:

Of course, as this Court has said on other occasions, what constitutes fairness in any proceedings will depend firmly on context. Lawyers, in particular, have a habit of equating fairness with the proceedings provided for in the Uniform Rules of Court. Were this approach to be adopted, the value of arbitration as a speedy and cost-effective process would be undermined. It is now well recognised in jurisdictions around the world that arbitrations may be conducted according to procedures determined by the parties. As such the proceedings may be adversarial or investigative, and may dispense with pleadings, with oral evidence, and even oral argument.

There may also be circumstances where it will be justified for a court to refer parties for mediation based on the benefits it would have to the case, despite the reluctance from either party. The possibility that a party may refuse participation in the process might be based on the fact that he or she is not familiar with the process and the benefits thereof.<sup>281</sup>

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<sup>280</sup> CCT 97/07 [2009] ZACC 6 Par 223.

<sup>281</sup> Tokiso Dispute Settlement 2015:57

It is noteworthy to mention that compulsory court-annexed mediation only compels disputants to try to settle their dispute and is it not the case that they must? settle. Nothing prevents the disputants who could not reach an agreement, to redirect the matter to the normal court procedures to have the case resolved in court.

The mentioned requirement for a pre-trial conference in both the High Court and the Magistrates' Court are not deemed to be unconstitutional, but rather focused on assisting the parties to settle matters easier and quicker. The process of mandatory mediation is therefore in support of this view. The option to resolve the matter by way of the conventional litigation procedure will always be available to disputants and should any argument in this regard based on the contravention of the constitutional right of access to courts, be refuted.

#### **4.5 First rules versus current rules**

With the implementation of court-annexed ADR in civil matters in South Africa, even at a stage where it is in an optional pilot scheme, it would be beneficial if there was an empowering regulatory regime to control the system.<sup>282</sup>

The Rules Board issued a set of draft rules for court-based mediation in 2011. The rules required that when an opposed civil matter comes before court it must be referred to mediation. The parties who refuse to participate in this mediation process will ultimately face punitive cost orders.<sup>283</sup> This was, however, rejected in the absence of enabling legislation sanctioning these rules.<sup>284</sup> Mediation was therefore implemented at the pilot sites as a voluntary process.

The legal profession was somewhat divided in their views on the proposed court-annexed mediation. Those who were resistant to mediation, based their arguments on that fact that the mediation process will eventually take work away from them as the disputes will be finalised quicker and without their interference. As a result, proposals were made for some amendments to the Rules, which included the following:

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<sup>282</sup> Boule 2012.

<sup>283</sup> Seduti 2012 Launch of court-based mediation pilot project. *De Rebus*, 1 February. <http://www.derebus.org.za/launch-court-based-mediation-pilot-project/> (accessed on 23 January 2018).

<sup>284</sup> RSA DoJ&CD 2014 "Court-Annexed Mediation Rules" <http://www.conflictdynamics.co.za/Files/107/Mediation-RulesBooklet.PDF> (accessed on 07 November 2017).

- Ensuring that mediation is not mandatory.
- Allowing legal representation at mediation meetings.
- Delaying a referral to mediation for a later stage, instead of after the filing of a notice of intention to defend.

The draft rules further provided that mediators must undergo a minimum of 40-hours training. This is the international minimum standard and various other countries require significantly more time and require that continuous professional development takes place. While the draft rules stated detailed training content, it did not require that the training institutions and the courses be accredited, for example by the South African Qualifications Authority (SAQA) or Skills Education Training Authorities (SETA).<sup>285</sup>

The court-annexed mediation rules which were to be implemented in the District and Regional Courts, formed part of the Government's determined effort to transform the civil justice system and were geared to enhance access to justice. They were drafted as part of the Civil Justice Reform Project (CJRP) which was approved by Cabinet in 2010.<sup>286</sup>

## 4.6 Conclusion

The increasing support of the judiciary in the judgements referred to in this chapter is indicative of the realisation of that arm of the judicial services that mediation offers a viable alternative to litigation. As indicated in the previous chapters, the support of the judiciary is an integral part to establish mediation as a core component of the dispute resolution culture in the South African justice system.

The feasibility of mediation is dependent on several factors. Government has realised that mediation offers a solution to many of the current constraints of the civil justice system. This is evident from the pilot court annexed-mediation initiative. It is suggested that continued support of government, both financially and legislatively, will be crucial in further developing mediation and to have it reach its full potential.

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<sup>285</sup> Brand 2016 "A critique of the South African Court Annexed Mediation Rules – what are the successes of the rules and what could we do better in the future?" Wits Median Conference, 20 July 2016. Conflict Dynamics. <http://www.conflictdynamics.co.za/Files/211/A-critique-of-the-Courtannexed-mediation-rules--MANDELA-INSTITUTE-PRESENTATION.pdf>

<sup>286</sup> Brand 2016.

The concerns of academics about the possible unconstitutionality of compulsory mediation is noted. It is, however, submitted with reference to the counter arguments postulated above that should mandatory mediation be implemented it will not pose a threat to the constitutional right to have a dispute resolved in a fair public hearing by a court or other forum.

## CONCLUSION AND RECOMMENDATIONS

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The current judicial system in South Africa requires that judgments be made available and justifiable reasons be given for the decisions taken. This is in disagreement to how mediation works, as mediation is a confidential process and there is no requirement to make any decision taken during this process public.

The challenge with this is that there is no way to establish if justice was done in a mediation process as it is simply a settlement agreement between two parties. The outcome is therefore not to necessarily serve the public but is rather focused on the private interest of the two parties.<sup>287</sup>

The researcher disagrees with the above statement as the interest of the community will ultimately be served if the dispute settlement processes are shortened and less expensive. This will finally also have an impact on the congested court roles which mean parties will spend less time in court, while at the same time they are building and/or restoring relationships.

In the instance that mediation becomes a compulsory process and considering the fact that if a party unreasonably refuses to take part in the process, there might be a risk of a cost order, parties might settle just for the sake thereof and not to do justice to the process. This might result in the matter not being settled and therefore be adjudicated at a later stage.<sup>288</sup> It would appear that the perception is that when it is compulsory to participate in the process of mediation that it is compulsory to settle, whereas that is not the case. If the parties cannot come to an agreement suitable to both, the option of the matter still being adjudicated afterwards should still be available.

The likelihood that litigants will be under more pressure in future to participate in mediation is inevitable. The question, however, will be as to whether this approach holds a limitation to the right of access to courts. As said by Budlender, access to courts as derived from the European Convention on Human Rights, is interrelated to

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<sup>287</sup> Vettorri 2015:360-361.

<sup>288</sup> Vettorri 2015:360-361,

the right to a fair hearing once a matter is before court.<sup>289</sup> Developed countries also make use of mediation, amongst other interventions, as a magic panacea to remedy the problems of the formal legal system.<sup>290</sup>

The authority mostly referred to in respect of mediation should be based on the decision taken by an appeal court in the United Kingdom in the case of *Halsey v Milton Keynes General NHS Trust*.<sup>291</sup> The court was faced with the question as to whether the successful party to the matter were to receive a cost order against him, based on the fact that he failed to take part in an ADR process.<sup>292</sup>

Lord Justice Dyson stated that the role of the court is to encourage mediation and not to compel parties to take part in the mediation process. In taking a decision as to whether the successful party should pay some or all of his costs on the grounds that he has refused to agree to ADR, it should be kept in mind that such an order would be the exception to the general rule.<sup>293</sup> Lord Justice Dyson went further to say:

In our view, the burden is on the unsuccessful party to show why there should be a departure from the general rule. The fundamental principle is that such departure is not justified unless it is shown (the burden being on the unsuccessful party) that the successful party acted unreasonably in refusing to agree to ADR.<sup>294</sup>

In other words, the unsuccessful party must show to the court that the matter could have been resolved by way of ADR or mediation, and therefore could have saved time and cost for both parties and the court. But due to the fact that the one party unreasonably refused to take part in the alternative process, more cost was incurred and time spent to eventually resolve the matter.

In this case, it was found that the unsuccessful party could not prove to the court that the Trust (the successful party) acted unreasonably in refusing to take part in the mediation process. The court took the following factors into account when dismissing the appeal application:<sup>295</sup>

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<sup>289</sup> Tokiso Dispute Settlement 2015:47-48.

<sup>290</sup> Patelia 2016:1.

<sup>291</sup> (2004) EWCA Civ 576.

<sup>292</sup> Tokiso Dispute Settlement 2015:47-48; Feehily 2009:293,

<sup>293</sup> The general rule refers to the costs that should follow the event or court case.

<sup>294</sup> <http://swarb.co.uk/halsey-v-milton-keynes-general-nhs-trust-etc-ca-11-may-2004/> (accessed on 28 January 2018).

<sup>295</sup> Advice Services Alliance 2004 "The Halsey Case" (2004) <http://asauk.org.uk/archive/alternative-dispute-resolution/adr-court-cases/the-halsey-case-2004/> (accessed on 28 January 2018).

- Even though the subject matter was not essentially suitable for mediation, the Trust believed it had a strong defence to the claim and had reasonable grounds for the belief.
- The court had not recommended or ordered mediation at any stage.
- There were grounds to believe that the offers of mediation from the claimant's representatives were 'somewhat tactical'.
- The Trust's view that the costs of mediation would be disproportionately high compared to the value of the claim and the cost of a trial, was a relevant factor.
- The judges believed that the claimant had not discharged the burden of proving that mediation had a reasonable prospect of success.<sup>296</sup>

Mediation is not a panacea for the ills of the civil jurisprudence, but it is a step forward in the right direction. If executed properly, assessed realistically, and measured against realistic expectations, it holds the potential of positive contributions to our citizens as well as for our civil justice system.

The concept of mandatory court-annexed mediation in the justice system and be implemented in the areas in law where it is applicable, it should be done with the view of promoting access to justice and enhancing the justice system. It is apparent that the process followed, and the outcome of mediation, are as legitimate as an entire court process would have been and is thus an equally effective system to resolve disputes. Early settlement of civil disputes has the potential to avert huge costs for litigants in instances where legal proceedings had not yet commenced or a significant reduction of costs where the mediated settlement was achieved during the instituted court proceedings. Mediation will therefore have a positive outcome in any dispute, irrespective of the stage the dispute is at when referred.

Although the Bill of Rights as enshrined in the Constitution of South Africa is based on the principle of equality in relation to the law, the reality thereof is yet to be achieved. People are still *de facto* excluded as they do not have the financial ability to take part in the administration of justice in a meaningful manner.<sup>297</sup>

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<sup>296</sup> Advice Services Alliance 2004 The Halsey Case (2004) <http://asauk.org.uk/archive/alternative-dispute-resolution/adr-court-cases/the-halsey-case-2004/> (accessed on 28 January 2018).

<sup>297</sup> SALC 1997:14.

There will always be those disputants who are reluctant to participate in the process of mediation, mainly because they would rather take their chances in court than to concede to possibly settle for less. But there are ways that one can address the issue caused by the reluctant litigants who unreasonably decline to take part in the process. The New Civil Procedure Rules which are applied in England and Wales as recorded in the Woolf Reforms, indicated that courts are encouraged to facilitate the participation of mediation and 'punish' the unwilling parties by way of cost orders.

The joint commitment of the South African legislature, judiciary, legal profession and the public, in general, is necessary to ensure the success of the mediation process being implemented in the South African civil justice system. From the discussion above, it is clear that the positive contributions that mediation has on the civil justice system far outweighs the negatives. This process will ultimately support and promote access to justice if implemented correctly and efficiently. As is evident from the submissions above, it is therefore recommended that mediation should be a mandatory process as initially stated in the draft rules and the court should issue punitive cost orders against those parties who do not act in good faith.

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